

# **Destitution as A Denial of Economic, Social and Cultural Rights: Addressing Destitution in The UK Through a Human Rights Framework**

**Luke D. Graham LLB, LLM**

Supervisor: Professor Sigrun Skogly

*A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy*

I declare that the thesis is my own work and has not been submitted in substantially the same form for the award of a higher degree elsewhere. No parts of the thesis have been published or submitted for a higher degree elsewhere.

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## **Abstract**

This thesis addresses destitution in the United Kingdom from a human rights-based perspective. In order to achieve this, part one of my thesis creates a human rights-based definition of destitution. In part two, this definition is applied to the context of the United Kingdom.

Destitution has not yet been explicitly defined in the language of human rights and, in fact, remains an unsettled concept beyond the sphere of human rights. The originality of this work therefore rests on the fact that it is the first work to explicitly define destitution using a human rights framework.

The contribution of this thesis is two-fold. Firstly, through framing the destitution experience in terms of tangible rights the aim is to further effective policy and law to tackle, and mobilise against, destitution. Secondly, the prevention and alleviation of destitution whilst being of value in itself, can also be a stimulus for the implementation of fundamental social and economic rights at the domestic level.

This thesis argues that a rights-based definition of destitution has two elements. The component rights and the destitution threshold. This author's human rights-based definition of destitution is: 'If any one, or more, of an individual's component rights are not realised to the destitution threshold then an individual is destitute.' From this starting point the thesis begins and works towards, in part one, defining the component rights and the destitution threshold. Having defined these concepts and enunciated my human rights-based definition of destitution in part one, my definition is applied to the context of the United Kingdom in part two. Part two will examine the context of – and I argue cause of increasing – destitution in the UK: austerity. Following this I determine what it means to be destitute under my definition in the UK before offering human rights-based solutions and recommendations to this ever-growing problem.

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## **Table of Abbreviations**

AAAAQ	Availability, Accessibility, Acceptability, Affordability and Quality
AIA	Asylum and Immigration Act
ASL	Adequate Standard of Living
A2J	Access to Justice
BBC	British Broadcasting Corporation
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DfE	Department for Education
DWP	Department for Work and Pensions
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESA	Employment and Support Allowance
ESC	European Social Charter
ESCRs	Economic, Social, and Cultural Rights
FAO	Food and Agriculture Organization
GDP	Gross Domestic Product
HRBA	Human Rights-Based Approach
HRC	Human Rights Committee

HRIAs	Human Rights Impact Assessments
HRW	Human Rights Watch
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ILO	International Labour Organization
IMF	International Monetary Fund
JCHR	Joint Committee on Human Rights
JRF	Joseph Rowntree Foundation
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LHA	Local Housing Allowance
MIS	Minimum Income Standard
NHS	National Health Service
NGO	Non-Government Organisation
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights
PPA	Participatory Poverty Assessment
SACC	South African Constitutional Court
SDG	Sustainable Development Goal
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations



UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
WHO	World Health Organization

# Chapter 1: Introduction

That a report on destitution needs to be written is itself a warning that current social support structures are not working. That this report is part of a new body of work that demonstrates, at best, the escape from destitution is via severe poverty and, at worst, that destitution is a continuing state for many individuals, calls into question the efficacy not just of our social systems in general but of the legal system in particular in protecting the basic rights and dignity of individuals in the UK.<sup>1</sup>

## 1.1. General Introduction

The findings of a 2016 Joseph Rowntree Foundation (JRF) Report that 1.25 million people experience destitution in the United Kingdom (UK)<sup>2</sup> has been the catalyst for renewed engagement with the concept of destitution in British society as a whole. A follow-up report in 2018 found that the scale of destitution in British society had grown to 1.5 million.<sup>3</sup> This is indicative that the problem of destitution in the UK is worsening. Now, in the summer of 2020 whilst the UK still reels from COVID-19 which – if projections are to be believed – will only be compounded by a no-deal (br)exit from the European Union it is likely that the scale of destitution in the UK will continue to grow. Alternative approaches to addressing destitution may therefore be required.

In addressing destitution in the UK through the lens of international human rights law, this thesis therefore contributes to an existing body of literature from an alternative perspective. As the quote from McKeever et al makes clear, the existence of destitution within British society indicates that social support structures are failing and this, in turn, has implications for

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<sup>1</sup> Gráinne McKeever et al., 'Destitution and Paths to Justice' (Joseph Rowntree Foundation 2018) 80 <<https://research.thelegaleducationfoundation.org/wp-content/uploads/2018/06/Destitution-Report-Final-Full-.pdf>> accessed 2 December 2019.

<sup>2</sup> Suzanne Fitzpatrick et al., 'Destitution in the UK' (Joseph Rowntree Foundation 2016) <<https://www.jrf.org.uk/file/49076/download?token=HiTkHrQg&filetype=full-report>> accessed 16 September 2016.

<sup>3</sup> Suzanne Fitzpatrick et al., 'Destitution in the UK 2018' (Joseph Rowntree Foundation 2018) <<https://www.jrf.org.uk/file/51558/download?token=SasLBzPB&filetype=full-report>> accessed 8 June 2020.

the ‘basic rights and dignity of individuals in the UK.’<sup>4</sup> The use of the phrase rights in this quotation does not, however, refer to international human rights law. Thus, although the concept of basic rights, the concept of dignity, and consequently the concept of destitution can be conceptualised from the perspective of international human rights law: no such conceptualisation has occurred. To my knowledge no existing work addresses destitution through the lens of international human rights and the nexus between destitution and the denial of economic, social and cultural rights remains unrecognised within academia and policy and practice. This is despite the explicit link between destitution and living conditions in which the enjoyment of several fundamental social and economic rights is lacking. Although Alston’s 2019 report on his visit to the UK as Special Rapporteur does make reference to destitution, this reference ‘merely’ quotes destitution figures as set out by the non-legal, non-human-rights-based work of the JRF.<sup>5</sup> Thus, despite the mention of the term destitution within his report, the term destitution has not been placed explicitly within the sphere, language, and framework of human rights. Therein lies the originality of this contribution.

In order to address destitution using human rights, that which is understood by the phrase destitution from the perspective of human rights must first be established. Thus, the first – and arguably most prominent research question – seeks to allow destitution to be defined from a human rights-based perspective. This research question is comprised of a number of sub-questions. These questions are: 1.a. What is the value-added of viewing destitution through the lens of human rights? 1.b. What is destitution and how should it be defined? 1.c. How does destitution relate to wider poverty? Research question 1 must be addressed in order to allow the remaining research questions to be answered. Research questions two, three, and four are:

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<sup>4</sup> McKeever et al. (n 1) 80.

<sup>5</sup> Phillip Alston, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the United Kingdom of Great Britain and Northern Ireland’ (2019) UN.Doc.A/HRC/41/39/Add.1 para 3.

2. Does social security policy and provision intersect with the occurrence, prevention and alleviation of destitution?
3. Does destitution represent a failure to realise ESCRs as contained within the ICESCR?
4. What can be done to address destitution in the UK more widely?

As is clear, all four research questions are interlinked. The first overarching research question requires that a human rights-based definition of destitution be created, and the remaining research questions require that this definition is utilised and applied to the context of the UK. As such, this thesis is split between two parts. Part one is titled ‘A Human Rights-Based Definition of Destitution’ and part two is titled ‘Destitution and Human Rights in the United Kingdom.’ This outline will be further expounded in section 1.5.

## **1.2. The Added Value of Addressing Destitution through the Lens of International Human Rights Law**

This thesis focuses upon destitution specifically as opposed to broader notions of the non-realisation of ESCRs more generally *in the UK* for a number of reasons. There exists an existing policy framework within the UK which focuses on destitution. As the opening lines of this chapter make clear, destitution is a growing problem in the UK which is need of being addressed. In addition to this, existing – albeit limited - case law demonstrates that destitution can be tackled in some circumstances using the ECHR and consequently mechanisms of enforcement which are more traditionally aligned with civil and political rights.<sup>6</sup> The same cannot be said of ESCRs more broadly understood and, as such, focusing more narrowly on destitution *may allow* for initial and more concrete steps to be made with respect to enforcement. As well as this, destitution may be regarded as the most extreme form of

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<sup>6</sup> See (n 85-93); see also (n 96-104)

deprivation in the UK. My analysis further in this section evidences the benefits which stem from addressing poverty as a concept using human rights can be combined with this reasoning to demonstrate the acute need which exists in the UK for examining destitution as a specific concept as opposed to examining the broader notion of the non-realisation of ESCRs.

Beyond this, it is logical to address research question 1.a within this introduction. This is because, the rationale underlying this thesis is that conceptualising destitution through the lens of human rights law can contribute to addressing destitution. The contention that using a human rights framework can aid in tackling destitution can be supported, analogously, by the literature which suggests that human rights can act as a tool for combatting poverty. Thus, this is indicative of the added value of addressing destitution through a human rights lens.

Despite accepting that it is not explicitly referenced in the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>7</sup> the Committee on Economic, Social and Cultural Rights (CESCR) has stated that the Universal Declaration of Human Rights (UDHR)<sup>8</sup> established poverty as a human rights issue<sup>9</sup> and that poverty is ‘one of the recurring themes in the covenant.’<sup>10</sup> This is because many of the rights enshrined in the ICESCR have ‘a direct and immediate bearing upon the eradication of poverty.’<sup>11</sup> Thus, the CESCR views poverty as forming ‘an essential element of the ICESCR’<sup>12</sup> and firmly holds the view ‘that poverty

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<sup>7</sup> Committee on Economic and Social Rights CESCR, ‘Substantive Issues Arising in The Implementation of The International Covenant on Economic, Social and Cultural Rights: Poverty and The International Covenant on Economic, Social and Cultural Rights’ (2001) UN.Doc. E/C.12/2001/10’ para 1. Para. 1

<sup>8</sup> United Nations General Assembly UDHR, ‘Universal Declaration of Human Rights (Adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)’.

<sup>9</sup> CESCR, ‘Substantive Issues Arising in The Implementation of The International Covenant on Economic, Social and Cultural Rights: Poverty and The International Covenant on Economic, Social and Cultural Rights’ (2001) UN.Doc. E/C.12/2001/10’ (n 7) para 1.

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

<sup>12</sup> Mashood Baderin and Robert McCorquodale, ‘Poverty and the International Covenant on Economic, Social and Cultural Rights’ in Geraldine Van Bueren (ed), *Freedom from Poverty as a Human Right* (UNESCO Publishing 2010) 344–367, 360.

constitutes a denial of human rights.’<sup>13</sup> Further still, the concept of poverty did arise in the context of discussions relating to the drafting of certain articles ‘particularly Article 11 on the right to an adequate standard of living,’<sup>14</sup> with ASL seemingly being accepted as ‘the right relevant for all issues associated with poverty.’<sup>15</sup>

Building on this, poverty is regarded by Sengupta as ‘the worst form of violation of human rights.’<sup>16</sup> This is understandable once it is considered that ‘the poor suffer from important material deprivations such as inadequate housing, medical care, and food consumption.’<sup>17</sup> As such, if the guarantees contained within the normative framework of international human rights law were fulfilled poor people would be lifted out of poverty.<sup>18</sup> This is due to the fact that a human rights-based approach to poverty eradication will focus on building the capacity of those experiencing poverty in order to alter the structural conditions ‘that result in a ‘poverty trap’.’<sup>19</sup> Furthermore, a human rights-based definition is also more appropriate because the living conditions faced by those experiencing poverty ‘demonstrate violations of a large variety of human rights.’<sup>20</sup>

Perhaps because poverty can be regarded as an obstacle to the attainment of both a

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<sup>13</sup> CESCR, ‘Substantive Issues Arising in The Implementation of The International Covenant on Economic, Social and Cultural Rights: Poverty and The International Covenant on Economic, Social and Cultural Rights’ (2001) UN.Doc. E/C.12/2001/10’ (n 7) para 1.

<sup>14</sup> Baderin and McCorquodale (n 12) 358.

<sup>15</sup> *ibid.*

<sup>16</sup> Arjun Sengupta, ‘On the Theory and Practice of the Right to Development’ (2002) 23 Human Rights Quarterly 837, 884.

<sup>17</sup> Katherine McFate et al., *Poverty, Inequality and the Future of Social Policy* (Russell Sage Foundation 1995) 109.

<sup>18</sup> Sigrun I Skogly, ‘Is There a Right Not to Be Poor?’ (2002) 2 Human Rights Law Review 59, 73.

<sup>19</sup> Amanda Cahill-Ripley and Sigrun I Skogly, ‘The Human Right to Adequate Food and to Clean and Sufficient Water’ in Geraldine Van Bueren (ed), *Freedom from Poverty as a Human Right* (UNESCO Publishing 2010) 113–137, 114.

<sup>20</sup> Skogly (n 18) 74.

decent standard of living and the realisation of human rights,<sup>21</sup> it is regarded by Chauvier as the violation of ‘an authentic human right.’<sup>22</sup> This links to Alegre’s contention that a right to be free from extreme poverty ‘is supported by the basic character of the interests it refers to.’<sup>23</sup> It follows that if destitution is extreme poverty, and it is accepted that there is a right to be free from extreme poverty: there is a right to be free from destitution.

As such, using human rights to tackle poverty may ‘empower the poor to obtain their rights’<sup>24</sup> by shifting the claims of the impoverished from claims of needs<sup>25</sup> to claims to ‘legally guaranteed entitlements.’<sup>26</sup> This in turn raises the status of poverty eradication measures<sup>27</sup> and places a binding obligation upon states to remove poverty.<sup>28</sup> Further still, such a human rights approach offers an inclusive way of addressing poverty;<sup>29</sup> conceiving a broader understanding which goes beyond low income alone<sup>30</sup> and, as such, more accurately depicts the experience of those who live in conditions of poverty.<sup>31</sup>

A broader conception of poverty is required given that ‘the poor suffer from important material deprivations such as inadequate housing, medical care, and food consumption.’<sup>32</sup>

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<sup>21</sup> United Nations Development Programme UNDP, *Human Development Report 2000* (OUP 2000) 33.

<sup>22</sup> Stephane Chauvier, ‘The Right to Basic Resources’ in Thomas Pogge (ed), *Freedom from Poverty as a Human Right* (OUP 2007) 303–322, 321.

<sup>23</sup> Marcelo Alegre, ‘Extreme Poverty in a Wealthy World: What Justice Demands Today’ in Thomas Pogge (ed), *Freedom from Poverty as a Human Right* (OUP 2007) 237–254, 254.

<sup>24</sup> Tom Campbell, ‘Poverty as a Violation of Human Rights: Inhumanity of Injustice’ in Thomas Pogge (ed), *Freedom from Poverty as a Human Right* (OUP 2007) 55–74, 56–57.

<sup>25</sup> Alice Donald and Elizabeth Mottershaw, ‘Poverty, Inequality and Human Rights: Do Human Rights Make a Difference?’ (Joseph Rowntree Foundation 2009) 5.

<sup>26</sup> *ibid* 13.

<sup>27</sup> Arjun Sengupta, ‘Poverty Eradication and Human Rights’ in Thomas Pogge (ed), *Freedom from Poverty as a Human Right* (OUP 2007) 323–344, 325.

<sup>28</sup> *ibid* 326.

<sup>29</sup> Ruth Lister, ‘Power, Not Pity: Poverty and Human Rights’ (2013) 7 *Ethics and Social Welfare* 109, 120.

<sup>30</sup> Donald and Mottershaw (n 25) 5.

<sup>31</sup> Valentin F Lang and Hildegard Lingnau, ‘Defining and Measuring Poverty and Inequality Post-2015’ (2015) 27 *Journal of International Development* 399, 406.

<sup>32</sup> McFate et al. (n 17) 109.

These three exemplar deprivations correlate, respectively, to the right to housing, the right to health, and the right to food. It follows, if access to the content of these rights is inadequate, that the rights of the poor - facing such material deprivations - are not being realised to the appropriate, or in fact required, levels. Although the component rights will not be identified until later in this thesis, this point is raised to demonstrate the linkages which exist between the experience of poverty and violations of human rights. These linkages allow the argument to be made that, if the rights which are being violated, are realised to the appropriate levels, and are respected, protected, and fulfilled, poverty would not arise.<sup>33</sup> Although it is accepted that a lack of income or other economic resources plays a causal role,<sup>34</sup> in interpreting poverty as a failure to satisfy basic needs<sup>35</sup> poverty can be given a human rights focus.

Poverty is associated with social weakness. Poverty and social weakness combined 'lead to exploitation and violations of human rights'<sup>36</sup> resulting from the 'economic unfreedom'<sup>37</sup> which is also associated with poverty. This is because patterns of poverty contribute to insecurity which prevents the enjoyment of fundamental rights.<sup>38</sup> Beyond acting as a cause of human rights violations, poverty can also act as the 'effect of human rights violations.'<sup>39</sup> Thus, poverty 'is both a cause and consequence of human rights failings, especially failings in regards to ESCRs.'<sup>40</sup> This notion of poverty as both the cause and the effect

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<sup>33</sup> Jurgen H Hohnholz, 'Poverty and Human Rights' (1991) 33 *Universitas* 57; Skogly (n 18) 62.

<sup>34</sup> Siddiqur Rahman Osmani, 'Poverty and Human Rights: Building on the Capability Approach' (2005) 6 *Journal of Human Development* 205, 215.

<sup>35</sup> Anuradha Mittal, 'Perspective: Economic Human Rights: The Time Has Come' (1998) 22 *Update on Law Related Education* 12, 12.

<sup>36</sup> Hohnholz (n 33) 63.

<sup>37</sup> Amartya Sen, *Development as Freedom* (OUP 1999) 8.

<sup>38</sup> Asbjorn Eide, 'Obstacles and Goals to Be Pursued' in Asbjorn Eide et al (ed), *Economic, Social and Cultural Rights: A Textbook* (Second Revised Edition, Kluwer International Law 2001) 553–562, 556.

<sup>39</sup> Roberto Cuellar, 'Poverty and Human Rights' [2007] *UN Chronicle* 41, 41.

<sup>40</sup> Sandra Ratjen and Manav Satija, 'Economic, Social, and Cultural Rights for All' in Eibe Riedel et al (ed), *Economic, Social, and Cultural Rights in International Law* (OUP 2014) 111–133, 124.



of human rights violations<sup>41</sup> links to the idea that the majority of those experiencing poverty do so due to socio-economic and political factors beyond their control.<sup>42</sup>

Consequently, if it is accepted, as I contend, that theories applicable to human rights-based approaches to poverty can also be applied to human rights-based approaches to destitution, it follows that such an approach has a number of benefits. Namely that such an approach can contribute to tackling destitution through multiple channels. The importance of determining a definition of human rights-based destitution is amplified given the limited nature of legal definitions, and consequently frameworks, in relation to destitution.<sup>43</sup> Many states have laws and frameworks which work towards the provision of basic necessities which are required in order to avoid destitution.

For example, the German Federal Constitutional Court has ‘read’ a ‘constitutionally guaranteed Existenzminimum, or "subsistence minimum,"’ into the German Basic Law.<sup>44</sup> Hunt observes ‘that this places an obligation on the government to provide the minimum level of subsistence required to ensure the material conditions necessary for physical existence, as well as the opportunity for a certain level of participation in political, cultural, and social life.’<sup>45</sup> Although this does align with conceptions of destitution, this subsistence minimum is derived from Article 1 of the Basic law in combination with Article 20: provisions relating to human dignity and the social state principle respectively.<sup>46</sup> This provides an example of how provisions

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<sup>41</sup> Geraldine Van Bueren, ‘Fulfilling Law’s Duty to the Poor’ in Geraldine Van Bueren (ed), *Freedom from Poverty as a Human Right* (UNESCO Publishing 2010) 1–20, 1.

<sup>42</sup> Victor George and Irving Howards, *Poverty amidst Affluence* (Edward Elgar Publishing Ltd 1991) 130. 130

<sup>43</sup> The limited nature of the UK’s statutory definition of destitution is explored in chapter 2.2.

<sup>44</sup> Ingrid Leijten, ‘The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection’ 16 German Law Journal 23, 27.

<sup>45</sup> Paul Hunt, ‘Social Rights Are Human Rights’ (Centre for Welfare Reform 2017) 23 <<https://www.centreforwelfarereform.org/uploads/attachment/584/social-rights-are-human-rights.pdf>> accessed 20 September 2019.

<sup>46</sup> See the case of HART IV cited in Leijten (n 44) 30.

may offer protection against destitution without explicitly referencing destitution. It is perhaps partly attributable to this that the explicit mention of destitution within legal provisions is extremely rare.

For those individuals who fall under my human rights-based definition of destitution, this definition may be of great potential. This is because explicitly defining destitution using a human rights-based framework will allow destitution to in turn be addressed utilising mechanisms and tools inherent to the human rights framework. Therein lies the rationale of creating a human rights-based definition of destitution: ensuring the realisation of the component rights to the destitution threshold and in doing so freeing individuals from destitution. Support for utilising a human rights-based approach to destitution is evidenced by the work of Bell and Cemlyn. Their research highlights that, in the UK, there exists a large degree of public support for ESCRs. The research concludes that, as ESCRs may have a less abstract meaning for people than civil and political rights, ESCRs ‘can help to build support for human rights law, more generally, as well as providing protection in an era of growing inequality.’<sup>47</sup> Therefore, this suggests that there would be public support for addressing destitution which was framed through the medium of ESCRs.

### **1.3. Methodology and the Theoretical Framework of this Thesis**

Salter and Mason observe that ‘experienced legal researchers have testified that there is no possibility of conducting research other than through the application of a particular frame of reference which determines how the dissertation is created, formulated and pursued.’<sup>48</sup> They observe that this frame of reference may be also termed as a paradigm of a methodology.

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<sup>47</sup> Karen Bell and Sarah Cemlyn, ‘Developing Public Support for Human Rights in the United Kingdom: Reasserting the Importance of Socio-Economic Rights’ (2014) 18 *The International Journal of Human Rights* 822, 836.

<sup>48</sup> Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education UK 2007) 39  
<<http://ebookcentral.proquest.com/lib/lancaster/detail.action?docID=5136574>> accessed 9 June 2020.

Methodology – which must be distinguished from the techniques used in conducting research (research methods) – can be understood as ‘the study of the general approach to inquiry in a given field’.<sup>49</sup> In the general sense ‘a methodology amounts to a systematic procedure that a scholar applies as part of an intellectual enterprise.’<sup>50</sup> This systematic procedure – this methodology – ‘relates directly to the formation of research projects, and then to the practicalities of carrying out research – what research questions we ask, what data we use, how we pursue our research agendas, how we explain why we examined what we did, or why we went about it in a particular way.’<sup>51</sup> Thus, the research methodology chosen will determine how the researcher systematically addresses the research questions posed and will also determine ‘the steps that are generally adopted by a researcher in studying the research problem along with the logic behind it.’<sup>52</sup>

Fisher et al highlight that ‘a commitment to the value of methodology is not a commitment to a particular methodology, but is a commitment to developing methodologies that are ‘best suited’ to the type of questions being asked.’<sup>53</sup> The concept of certain methodologies being best suited to the area of research being addressed is well encapsulated in the metaphor deployed by Salter and Mason. They suggest that if there is a conflict between the ‘particular methodological tools selected, and the specific requirements of the task in hand,’ then the wrong ‘tool for the job’ has been deployed by the author.<sup>54</sup> It follows that any research project must be conscious of the methodology which it employs to ensure that the methodology

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<sup>49</sup> Shazia Qureshi, ‘Research Methodology in Law and Its Application to Women’s Human Rights Law’ (2015) 22 *Journal of Political Studies* 629, 630.

<sup>50</sup> Elizabeth Fisher and others, ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’ (2009) 21 *Journal of Environmental Law* 213, 226.

<sup>51</sup> Tamara Hervey and others, *Research Methodologies in EU and International Law* (Bloomsbury Publishing 2011) 1.

<sup>52</sup> Qureshi (n 49) 630.

<sup>53</sup> Fisher and others (n 50) 227.

<sup>54</sup> Salter and Mason (n 48) 40.

best suited to addressing the research questions is used. This in turn ensures that the research questions are addressed appropriately.

Concerning research methodology in the field of law, ‘legal scholarship has historically followed two broad traditions’: The Black Letter Approach to Law and the Socio-Legal Approaches.<sup>55</sup> As the following paragraphs will make clear, these two approaches are markedly different and it has been observed that there exists an intellectual tension between these two approaches.<sup>56</sup> This is because, ‘sociolegal research is often interpreted as posing a radical challenge to the credibility, even the continued existence, of black-letter approaches.’<sup>57</sup>

The Black Letter Approach was, until recently, ‘the principal methodology in legal research.’<sup>58</sup> Salter and Mason observe that the central point to be recognised is that the Black Letter Approach ‘is a particular way of interpreting what is deemed to count as legal research, including which materials are considered relevant.’<sup>59</sup> Central to the Black Letter Approach is an assumption that ‘the answers and solutions to every legal problem are available in the underlying logic and structure of rules which can be discovered by exposition and analysis of the legal doctrine’<sup>60</sup> From this assumption stems an extensive – but not sole - reliance ‘on using court judgments and statutes to explain law.’<sup>61</sup>

Consequently, compared to the Socio-Legal Approach, the Black Letter Approach takes a restrictive and narrow view as to what materials are relevant when undertaking legal

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<sup>55</sup> Mike McConville and Wing Hong (Eric) Chui, ‘Introduction and Overview’ in Mike McConville and Wing Hong (Eric) Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017) 1 <<http://ebookcentral.proquest.com/lib/lancaster/detail.action?docID=5013854>> accessed 9 June 2020.

<sup>56</sup> Salter and Mason (n 48) 34–35.

<sup>57</sup> *ibid* 35.

<sup>58</sup> Qureshi (n 49) 630.

<sup>59</sup> Salter and Mason (n 48) 44.

<sup>60</sup> Qureshi (n 49) 631.

<sup>61</sup> McConville and Chui (n 55) 4.

research. This restrictive approach to the relevancy of materials is understandable given that, regardless of the exact nature of the Black Letter Approach undertaken in any given research, an underlying common theme of the Black Letter Approach ‘insists that law is a pure concept, independent of morality, politics/power or other outer influences.’<sup>62</sup> The aim of this is to preserve the ‘neutral, objective, detached and thereby superior status [of law] as a normative science.’<sup>63</sup> As such, the Black Letter Approach insulates the legal research undertaken from ‘non-legal factors’ regarding, for example, policy and ideological issues as if these were somehow ‘external’ to, and independent of, strictly legal research.’<sup>64</sup> This narrowness of scope has been raised as criticism and, the Black Letter Approach has been criticised a failing ‘to prepare students and legal professionals to attend to non-doctrinal questions.’<sup>65</sup>

Even so, Berard highlights that ‘there has always been some recognition in legal education, albeit often implicit, of the fundamental fact that law cannot be adequately understood in strictly legal terms.’<sup>66</sup> This can be expanded using Schiff’s suggestion that ‘the relationship of the law, in its many aspects, to a social situation, should be considered a necessary part of the understanding of that situation. The development of forms of analysis which allow for such interrelated understanding are therefore required.’<sup>67</sup> The Socio-Legal Approach to legal research allows for such analysis. Although there exists no consensus as to the definition of the Socio-Legal Approach,<sup>68</sup> Cotterrell observes that the ‘deliberate self-distancing from the professional viewpoint of the lawyer’ unifies such approaches.<sup>69</sup> Such

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<sup>62</sup> Qureshi (n 49) 631.

<sup>63</sup> *ibid.*

<sup>64</sup> Salter and Mason (n 48) 44.

<sup>65</sup> McConville and Chui (n 55) 5.

<sup>66</sup> Timothy J Berard, ‘The Relevance of the Social Sciences for Legal Education’ (2009) 19 *Legal Education Review* 189, 190.

<sup>67</sup> David N Schiff, ‘Socio-Legal Theory: Social Structure and Law’ (1976) 39 *The Modern Law Review* 287, 287.

<sup>68</sup> Qureshi (n 49) 633.

<sup>69</sup> Roger Cotterrell, ‘The Sociological Concept of Law’ (1983) 10 *Journal of Law and Society* 241, 242.

distancing is required given that ‘an inevitable gap exists between black letter law and law-in-action.’<sup>70</sup> A Socio-Legal Approach seeks to bridge this gap in order to depict ‘a true picture of law-in-action.’<sup>71</sup>

To achieve this, the Socio-Legal Approach is less restrictive than the Black Letter Approach with regard to what materials are considered relevant and credible within legal research. Thus, ‘the socio-legal approach can broaden the scope of legal research both by making available vast varieties of information and by providing conceptual frameworks within which the information can be evaluated.’<sup>72</sup> This allows different topics to be addressed using a variety of lenses which was previously limited under the restrictive Black Letter Approach.<sup>73</sup> Vick observes that the obvious place for legal theorists to turn in order to cultivate this variety was the social sciences.<sup>74</sup> Borrowing ideas and techniques from other disciplines both broadens the scope of the research and allows the research questions to be addressed in their wider context.<sup>75</sup>

Given their very nature, when Socio-Legal Approaches advocate for reform they do so from the position that ‘the operation of the present legal position is out of step with what a desirable policy should be attempting to bring about.’<sup>76</sup> On account of this, it is little wonder that the Socio-Legal Approach has been considered to be ‘tied inextricably to specific liberal and radical political agendas.’<sup>77</sup>

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<sup>70</sup> Patrick Schmidt and Simon Halliday, ‘Introduction: Socio-Legal Perspectives on Human Rights in the National Context’ in Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home* (Hart Publishing 2004) 7.

<sup>71</sup> Qureshi (n 49) 632.

<sup>72</sup> *ibid* 635.

<sup>73</sup> *ibid* 633.

<sup>74</sup> Douglas W Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163, 183.

<sup>75</sup> Salter and Mason (n 48) 177.

<sup>76</sup> *ibid* 162.

<sup>77</sup> *ibid* 178.

Throughout this thesis I draw on research from a range of disciplines. As such, my decision to utilise a predominantly Socio-Legal Methodology can be supported using McConville and Wing's contention that 'the merits and relevance of using other disciplines such as sociology, political science, economics, psychology, history and feminism as aids to legal research have been widely recognised.'<sup>78</sup>

Additionally, concerning the field of international human rights law specifically, Schmidt and Halliday argue that 'a research agenda based in socio-legal studies has much to offer as a complement to such work.'<sup>79</sup> More so, Hoffman and Rumsey contend that, as many international issues cross over into other fields, 'a savvy international legal researcher will consult materials in other related disciplines, such as political science, public policy, health, economics, etc.'<sup>80</sup> As well as this, Qureshi highlights that 'socio-legal study of human rights has brought fresh insights into its theory and praxis.'<sup>81</sup> These points are raised to demonstrate the relevance of Socio-Legal Approaches to research concerning international human rights law and to demonstrate how the interdisciplinary nature of the Socio-Legal Approach is required to provide a more contextually complete picture.

Justified by this analysis, this thesis utilises a predominantly Socio-Legal Methodology. This phrasing is carefully selected given that 'some elements of doctrinal analysis are found in all types of legal research.'<sup>82</sup> As such, some parts of this thesis are more socio-legal than others. I do engage with case law, statute, and international treaties. However, this engagement is supplemented by reference to a whole range of relevant materials from a diverse range of

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<sup>78</sup> McConville and Chui (n 55) 5.

<sup>79</sup> Schmidt and Halliday (n 70) 3.

<sup>80</sup> Marci Hoffman and Mary Rumsey, *International and Foreign Legal Research: A Coursebook* (BRILL 2012) 225 <<http://ebookcentral.proquest.com/lib/lancaster/detail.action?docID=919556>> accessed 9 June 2020.

<sup>81</sup> Qureshi (n 49) 634.

<sup>82</sup> *ibid.*

disciplines. This is not uncommon as ‘legal academics often tend to mix approaches. For instance, it is not uncommon that a legal researcher starts with an historical introduction, then turns to an analysis of the relevant case law and finally engages with socio-political considerations.’<sup>83</sup> A predominantly Socio-Legal Approach is appropriate for this thesis given that – although destitution has been defined from a legal perspective – the experience of destitution is an extra-legal concept which has been addressed in the UK by several academic disciplines.

As this thesis will make clear, existing research concerning destitution has demonstrated that destitution is intrinsically linked to political and economic policy factors. To comprehensively address destitution, these political and economic factors must be engaged with. As is clear from this section, a Socio-Legal Approach is best suited to properly and critically engage with these factors which are external to the law. This thesis develops new and original theory as part one develops a theoretical framework – my proposed human rights-based definition of destitution – which is then applied to the context of the UK in part two.

This socio-legal approach allows for knowledge from a variety of disciplines to be integrated into this thesis. In addition to this, primary legal sources are also used. For the reasons outlined in section 1.2., this thesis approaches destitution *in the UK* from the perspective of *international* human rights law. Twinned with the focus on the UK, this perspective limited the focus of this thesis with respect to cases, treaties, and international instruments. Although the ECHR is integrated into domestic law and as such is justiciable, other international human rights treaties are not. Despite this, the ‘UK is subject to a legal and moral obligation to work towards the realisation of the rights conferred, flowing from international law and its own statement that it does not ratify treaties “unless confident that

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<sup>83</sup> Mathias M Siems and Daithí Mac Síthigh, ‘Mapping Legal Research’ (2012) 71 The Cambridge Law Journal 651, 668.



domestic law and practice is consistent with them”.<sup>84</sup> As such, the key sources of law referred to throughout this thesis are of an international as opposed to regional nature. This is with the exception of the destitution case law stemming from the ECHR and HRA. Moreover, given that this thesis addresses destitution as a denial of ESCRs the international documents focused upon are those which directly address these rights. This results in the exclusion of the European Social Charter as it does not address the same rights as the ICESCR and most certainly does not address ICESCR rights in the same manner. This is because, the 1961 Charter (being the one applicable to the UK) does not guarantee the same rights as the ICESCR and, for example, the UK does not consider itself to be bound by Article 12 of the Charter which relates to the right to social security.

#### **1.4. Setting the Limits of this Thesis**

For reasons which will expounded throughout part one of this thesis, the human rights-based definition of destitution which I propose focuses upon Article 11 and Article 9 of the ICESCR. I contend that this focus on the right to an adequate standard of living and the right to social security most readily aligns with existing conceptions of destitution. However, this focus results in the exclusion of a number of other ESCRs from my proposed human rights-based definition of destitution. Not only this, but this focus excludes substantive analysis of the ECHR and its case law.

To be clear from the outset, although an interrelationship does exist between other ESCRs, *inter alia*, the right to health, the right to education, and the right to work and destitution, my analysis does not support the inclusion of these rights within a human rights-based definition of destitution. This exclusion rests upon a number of overlapping arguments.

With respect to the right to health, although the experience of destitution does have

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<sup>84</sup> Mark Simpson, Gráinne McKeever and Ann Marie Gray, ‘From Principles to Practice: Social Security in the Scottish Laboratory of Democracy’ (2019) 26 *Journal of Social Security Law* 13, 19.

implications for – and negatively undermines - the physical, mental, and social wellbeing (health) of individuals, I will evidence that the negative health outcomes which are caused by destitution are in fact the result of a failure to realise other ESCRs. Thus, any right to health claims will do little, if anything, to address destitution. Even so, the negative health outcomes caused by destitution can be distinguished from destitution caused by a failure to realise the right to health. When failures regarding the right to health cause destitution – for example if ill-health, which could be treated if the right to health were realised, prevents an individual from working – an adequate social security system would protect that individual from destitution. Thus, both as a consequence and cause of destitution, a failure to realise the right to health – although closely tied to destitution – is not the predominant human rights issue. Alongside resting in the peripheral of the interrelationship between human rights and destitution, given the variety of – very often competing – rights claims which may be made under the right to health it would be difficult to in anyway comprehensively determine to what an extent a failure to realise the right to health constitutes destitution. For these reasons, although I do recognise the interrelationship which exists between destitution and the right to health, the right to health does not form a part of my human rights-based definition of destitution.

Similar reasoning can be applied to the right to education and the right to work. The essence is that although a failure to adequately realise these rights *may* cause destitution, the failure to adequately realise these rights will not *always* result in the experience of destitution. This is the key factor which differentiates the rights which I identify as being a part of my destitution definition in chapter 4; if the rights identified in chapter 4 are not adequately realised an individual is *always* regarded as destitute under my proposed definition. As such, although other rights do relate to destitution they go beyond the scope of this thesis as they are not central to the experience of destitution.

This foregrounding of ICESCR rights does not engender use of the ECHR as a tool by which to address destitution. Although the European Court of Human Rights (ECtHR) has held that an applicant's living conditions can amount to a violation of Article 3 of the Convention,<sup>85</sup> the Court attached 'considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection.'<sup>86</sup> This draws parallels to the way in which the UK's domestic courts have approached destitution through the lens of Article 3<sup>87</sup> and demonstrates the inadequacies of Article 3 of the ECHR in addressing destitution more broadly.

In the first sense, the focus of the ECHR is civil and political rights and not ESCRs which – this thesis highlights – are central to human rights-based understandings of destitution. One implication of this is that the application of Article 3 of the ECHR 'appears limited to specific circumstances where a clear relationship of dependency and need exists: it certainly does not constitute a transformation of the Convention into a socio-economic rights instrument.'<sup>88</sup> That is that this focus on civil and political rights is not concerned with the experience of destitution – understood as the non-realisation of ESCRs - *per se* and offers no protections against destitution to the vast majority of individuals.

Linking to this, Simpson highlights that a successful claim arguing that destitution constitutes inhuman and degrading treatment under Article 3 of the ECHR 'would depend on the claimant essentially being rendered unable to access food or shelter to such an extent and for such a period as to cause significant suffering. *This probably implies individuals not*

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<sup>85</sup> *MSS v Belgium and Greece* [2011] Grand Chamber of the European Court of Human Rights Application no. 30696/09 page 88.

<sup>86</sup> *ibid* 251.

<sup>87</sup> See (n 96-104)

<sup>88</sup> Colm O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 E.H.R.L.R 583, 601–602.

*awarded a hardship payment and with no accessible charitable or familial support.*<sup>89</sup> This further limits the category of persons able to utilise the shield of Article 3 against the experience of destitution. More so, in the second sense, a reliance on charitable assistance is incompatible with the realisation of ESCRs<sup>90</sup> and such reliance is a defining feature of destitution.<sup>91</sup> Thus, the vast majority of individuals experiencing destitution in the UK would be excluded from bringing a claim under Article 3 ECHR.

In the third sense, O’Cinneide has highlighted the modesty of scope and ambition of the ‘developing case law on questions of state responsibility for individual destitution.’<sup>92</sup> The focus on *individual* destitution is key here and, more recently, Simpson has observed that any finding of a violation of Article 3 of the ECHR based upon the experience of destitution ‘would be on the basis of individual circumstances rather than an unlawful policy.’<sup>93</sup> This highlights the inadequacies of the ECHR in addressing the structural causes of destitution. This inability of the ECHR to address structural causes of destitution is a key weakness of such approaches given that – as I argue in Chapter 5 – rising destitution in the UK is a result of structural forces.

## **1.5. Outline of this Thesis**

This thesis is split between two parts. Part One – A Human Rights-Based Definition of Destitution - is composed of three chapters. The first of these, chapter 2, will identify themes from existing definitions of destitution in order to allow the concept of destitution to be grounded within the sphere of human rights. In this sense, chapter 2 translates destitution into the language of human rights. This is achieved by extrapolating themes from a number of

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<sup>89</sup> Mark Simpson, “‘Designed to Reduce People...to Complete Destitution’: Human Dignity in the Active Welfare State’ (2015) 1 E.H.R.L.R 66, 76–77.

<sup>90</sup> See (n 112-116)

<sup>91</sup> For a human rights focused critique of a reliance on charitable provision (which I term charitable assistance) to realise the component rights see chapter 2.2; see also chapter 2.4.3.; see also chapter 6.3.

<sup>92</sup> O’Cinneide, ‘A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights’ (n 88) 601–602.

<sup>93</sup> Simpson (n 89) 76–77.

existing definitions of destitution and identifying correlative human rights concepts. This will ensure that my human rights-based definition of destitution aligns with existing understandings of destitution. In chapter 3, this translation is applied to determining the level of rights realisation required in order to avert destitution. This destitution threshold is addressed before the rights which are engaged by my destitution definition are addressed in chapter 4 so as to allow consideration of the destitution threshold to form part of the analysis of these rights.

However, as will become clear throughout part one, the experience of destitution is not similar across different contexts. As such, in order to be applicable as a tool for tackling destitution my human rights-rights based definition of destitution must be contextualised. Part Two of this thesis – Destitution and Human Rights in the United Kingdom – will undertake such a contextualisation. This will be achieved by examining the social-policy context of austerity (chapter 5) in order to allow the (non-)realisation of the component rights to be more thoroughly understood. Having addressed the context in which destitution in the UK is occurring, what constitutes destitution in the UK under my rights-based definition will be detailed in chapter 6. Chapter 6 will apply the analysis from part one of this thesis to the context of the UK in order to address how destitution may be understood from the perspective of human rights in this context. Following this, chapter 7 explores how human rights can be used to tackle the destitution within the UK as highlighted in chapter 6. This will lead into the eighth and final chapter – the conclusion.

# **Part One: A Human Rights-Based Definition of Destitution**

## **Chapter 2: Grounding Destitution Within the Sphere of Human Rights**

### **2.1. Introduction**

This chapter will consider existing definitions of destitution to extrapolate the key themes behind them. These key themes will be utilised as a tool by which to place the concept of destitution within the sphere of human rights in the later chapters of Part One. Chiefly, these themes will be used to translate destitution into the language of human rights.

This chapter is split between three substantive sections. The first of these, section 2.2., examines the existing definitions of destitution. Traditional conceptions, the UK's statutory definition, and the Joseph Rowntree Foundation (JRF) definition, of destitution will be explored here. It will be contended that these various definitions, and in fact their underlying themes, can be tied together via the concept of living standards. That is, that destitution is the experience of living below a certain standard of living. It is contended that this standard of living can be determined by extrapolating key themes of the destitution experience from existing definitions.

Building upon this, the second substantive section of this chapter, section 2.3, will further examine these underlying themes. This is with the purpose of mapping these themes into the sphere of human rights. Following this, section 2.4 will examine each of the destitution themes. In translating destitution into the language of human rights, this chapter will act as the foundation for the remainder of the analysis in part one, which explores – and enunciates – a human rights-based definition of destitution.

### **2.2. Existing Definitions of Destitution**

In traditional usage, as Gangopadhyay et al. contend, destitution can be defined as ‘an extreme form of poverty that forces individuals to rely on social transfers like public and private

charities, alms and welfare programmes for survival.’<sup>94</sup> This definition has two primary elements. Firstly, the notion of extreme poverty as characterised by survival needs and secondly a reliance on social transfers. This second element is indicative of precariousness which in turn is a manifestation of vulnerability. This vulnerability is further indicative of indignity. As such, I contend that three main destitution themes can be extrapolated from traditional conceptions of destitution: survival needs; vulnerability; and indignity. These concepts are representative of the notion of extreme hardship, which has been described as a characteristic of destitution<sup>95</sup> and, as such, these themes will be explored further below.

In the context of the United Kingdom, the only statutory and legal definition of destitution pertains specifically to migrants, asylum seekers and refugees. The Asylum and Immigration Act definition focuses upon either; lacking adequate accommodation, or the means to obtain it; or an inability to meet essential living needs.<sup>96</sup> This would appear to align with the traditional conception of destitution as well as the destitution themes highlighted in the preceding paragraph.

Even so, the statutory definition of destitution in the Asylum and Immigration Act does not apply to many of those who can be considered to be experiencing destitution within the U.K. as this definition is of a limited and narrow scope with no grounds for application outside of the asylum and immigration context. Despite this, the relevant case law has resulted in some positive findings, where destitution has been proven when social security payments have been refused or withdrawn.<sup>97</sup> Nolan et al. highlight the *Limbuela* case as but one example of the

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<sup>94</sup> Partha Gangopadhyay et al., ‘Working Poverty, Social Exclusion and Destitution: An Empirical Study’ (2014) 37 *Economic Modelling* 241, 241.

<sup>95</sup> HPP Lotter, ‘Defining Poverty as Distinctively Human’ 63 *HTS* 1195, 1206.

<sup>96</sup> Asylum and Immigration Act 1999 s 95.

<sup>97</sup> *R v Secretary of State for the Home Department ex parte Adams, Tesema and Limbuela* [2005] UKHL 66.



failure of UK law to ‘protect fully the rights found in the ICESCR.’<sup>98</sup> The *Limbuela* case engaged with Article 3 of the European Convention on Human Rights (ECHR). This provision contains an absolute prohibition against torture or inhuman or degrading treatment or punishment. However, the focus in *Limbuela* was ‘on inhuman and degrading treatment.’<sup>99</sup> It was recognised that ‘treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being.’<sup>100</sup> This would appear to readily engage the concept of destitution.

However, it was held that ‘a general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3.’<sup>101</sup> As Lord Scott made clear,

‘if individuals find themselves destitute to a degree apt to be described as degrading the state’s failure to give them the minimum support necessary to avoid that degradation may well be a shameful reproach to the humanity of the state and its institutions but, in my opinion, does not without more engage article 3. Just as there is no ECHR right to be provided by the state with a home, so too there is no ECHR right to be provided by the state with a minimum standard of living: “treatment” requires something more than mere failure.’<sup>102</sup>

Thus, the claimants in *Limbuela* succeeded in their claim not because they experienced destitution but due to the circumstances in which they entered into a state of destitution. The claimants were able to argue that, due to the fact they were legally prohibited from seeking employment, the state’s decision to deny them social security payments ‘forced’ them into

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<sup>98</sup> Aoife Nolan and others, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Taylor & Francis Group 2014) 21 <<http://ebookcentral.proquest.com/lib/lancaster/detail.action?docID=1596923>> accessed 30 June 2020.

<sup>99</sup> *ex parte Adams, Tesema and Limbuela* (n 97) para 6.

<sup>100</sup> *ibid* 7.

<sup>101</sup> *ibid*.

<sup>102</sup> *ibid* 66.

destitution. The imposition of these policies was regarded by the court to amount to ‘positive action directed against asylum-seekers and not to mere inaction’ which constituted ““treatment” within the meaning of the article.’<sup>103</sup> Thus, it is clear that an Article 3 claim by a member of the general public who is experiencing destitution will likely fail. This is because it is unlikely that the circumstances leading to an individual’s experience of destitution will constitute ‘treatment’ for the purposes of Article 3. Although I will make clear in chapter 5, especially chapter 5.6, that austerity in the United Kingdom since 2010 has been inherently destitution inducing, it is telling that no Article 3 claims have succeeded with respect to the destitution experience outside of the Asylum and Immigration context in the UK. Thus, destitution only engages Article 3 of the ECHR in the UK in very limited circumstances.

This suggests that the experience of destitution is not incompatible with Article 3 of the ECHR. This is stated explicitly in the case of *R (W)*, which holds that ‘the fact that someone is “destitute” as the term is defined for the purposes of s. 95 of the 1999 Act does not necessarily mean that he or she is enduring treatment contrary to Article 3 ECHR: the threshold of severity which must be reached to make out a breach of Article 3 is higher than that required for a finding of destitution within the s. 95(3) definition.’<sup>104</sup> This shows the inadequacy of the ECHR – and the Human Rights Act which enshrines this domestically within the UK – as a tool for tackling not only destitution but also the non-realisation of ESCRs within the UK. Even despite this, these cases demonstrate the ability, and potential, of the law to tackle destitution.

Beyond this, the statutory definition has had some wider applicability with regard to the income level determined as adequate, by the government, to allow for essential needs to be met. The case of *Mensah v Salford City Council, Bello v Salford City Council* [2014] evidences

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<sup>103</sup> *ibid* 56.

<sup>104</sup> *R (W, A Child by His Litigation Friend J) v The Secretary of State for the Home Department* [2020] EWHC 1299 (Admin) [42].

how the level of financial assistance set by the Asylum and Immigration Act has been lawfully used by other public bodies to determine the ‘the basic amount considered appropriate to meet their subsistence needs.’<sup>105</sup> This was with regard to assistance under section 17 of the Children Act 1989. This demonstrates that the subsistence level determined by the Asylum and Immigration Act has broader implications. As well as being provided somewhere to live, this level is currently set at £37.75 per person per week.<sup>106</sup> It could therefore follow from this that, provided that an individual has access to housing, income of £37.75 per week is sufficient to meet other essential living needs and thus ward off destitution.

Through collating existing case law, McKeever et al have analysed the definition found in the Asylum and Immigration Act in greater detail.<sup>107</sup> This case law supports the notion of destitution being more than food, clothes and shelter.<sup>108</sup> For example, Price suggests that the *Refugee Action* case interprets the concept of essential living needs broadly ‘to include toiletries, nappies and the means to maintain interpersonal relationships, meaning that those who cannot afford such things are considered to be destitute.’<sup>109</sup>

However, unlike the traditional definition, the statutory definition in the Asylum and Immigration Act also finds that ‘it is reasonable for a local authority to assess the alternative support available to a family that could prevent destitution e.g., through earnings or the support

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<sup>105</sup> *Mensah v Salford City Council, Bello v Salford City Council* [2014] EWHC (Admin) 3537 [45–57]. This case related to British national children whose single parents – being non-British nationals – were eligible to remain in the UK albeit with no recourse to public funds (ineligible for social security or housing benefit). In this case, the council provided a furnished flat and basic financial assistance set at a level determined by reference to the amount that the Secretary of State would provide to a failed asylum seeker and his or her dependants to enable them to purchase food and essential toiletries, pursuant to section 4 of the Immigration and Asylum Act 1999 [2].

<sup>106</sup> ‘Asylum Support’ (GOV.UK) <<https://www.gov.uk/asylum-support/what-youll-get>> accessed 30 March 2020.

<sup>107</sup> McKeever et al. (n 1) 14–26.

<sup>108</sup> *Refugee Action v SSHD* [2014] EWHC 1033 (Admin).

<sup>109</sup> Jonathon Price, ‘Children and Families: Destitution, Safeguarding and Services’ (Welsh Refugee Council 2015) 7; see also *Refugee Action v SSHD* (n 108) paras 50, 83, 117.

available from family and friends.’<sup>110</sup> This is at odds with the traditional definition to which a reliance on such provision is a characteristic of the destitution experience.

In this regard, the JRF definition of destitution aligns more readily with the traditional as opposed to the statutory understanding of destitution. Part of the JRF definition considers an individual to be destitute if their income was so extremely low that they were unable to purchase essentials for themselves.<sup>111</sup> This alternative pathway to being defined as destitute is justified by the JRF report’s authors in that ‘a majority of the public took the view that people who were only able to meet their essential living needs with help from charities, for example, should be considered destitute.’<sup>112</sup>

This notion of dependency on others to attain these basic necessities is representative of traditional conceptions of destitution and such dependency can be criticised from a human rights-based perspective. I therefore endorse this aspect of the JRF definition. This is because those who are dependent on charity, and upon others, face the risk of access to these necessities being withdrawn. Thus, their access to such necessities is insecure and on account of this is both undignified and exposes individuals to vulnerability. This insecurity is premised upon the fact that unlike ‘socially and legally guaranteed entitlements,’<sup>113</sup> individuals have no means of enforcing any claim, nor in fact have any claim, to discretionary charity (charitable assistance). Thus, if the donor becomes unable or unwilling to continue in their provision of these basic necessities the dependant recipient will lose this source of access and, failing alternative sources of provision, will therefore be without these necessities. This demonstrates how vulnerability manifests itself through insecurity of provision. In summary, charity ‘involves

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<sup>110</sup> Price (n 109) 7.

<sup>111</sup> Fitzpatrick et al. (n 2) 2.

<sup>112</sup> *ibid.*

<sup>113</sup> Donald and Mottershaw (n 25) 13.

neither a right of the individual nor a duty imposed on the state.’<sup>114</sup> Consequently, an individual who is dependent on charitable sources for the provision of basic necessities is in a precarious and insecure position as the attainment of such necessities is fully beyond their control. These sentiments will be expounded upon in both chapter 5 and chapter 6 of this thesis.<sup>115</sup> A rights-based approach can be useful here, therefore, as a tool for tackling this insecurity by reframing these issues of need to issues of entitlement<sup>116</sup> and thus empowering individuals to ensure their own access to basic necessities.

Additionally, in the context of the United Kingdom, the JRF definition of destitution determines an individual to be destitute if, due to an inability to afford them, they or their children, had lacked two or more out of six essentials over the past month.<sup>117</sup> These essentials were determined to be shelter, food, heating, lighting, clothing and footwear, and basic toiletries. Although the report does not expressly refer to these essentials as rights, these essentials, as the constituent elements of the JRF definition, draw parallels to a number of pre-existing rights such as the right to adequate housing, the right to clothing, the right to food, the right to water, and the right to sanitation. All of these rights are constituent elements of the right to an adequate standard of living.<sup>118</sup> Furthermore, despite being based upon public perceptions, these essentials mirror those highlighted in the above analysis of destitution as an extreme form

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<sup>114</sup> Asbjorn Eide, ‘Adequate Standard of Living’ in Daniel Moeckli et al. (ed), *International Human Rights Law* (Third Edition, OUP 2018) 186–207, 202.

<sup>115</sup> For analysis framing austerity in the UK since 2010 as inherently destitution inducing given that it was designed to foster a reliance on the ‘big society’ which itself relies on charity see chapter 5.6: For a human rights focused critique of a reliance on charitable provision (which I term charitable assistance) to realise the component rights see section 2.2.; see also chapter 6.3.

<sup>116</sup> Olivia Ball, ‘Human Rights-Based Analysis: What, Why and How?’ in Robert Garbutt (ed), *Activating Human Rights and Peace: Universal Responsibility Conference 2008 Conference Proceedings* (Centre for Peace and Social Justice 2010) 140.

<sup>117</sup> Fitzpatrick et al. (n 2) 2.

<sup>118</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) (Adopted on 16 December 1966, A/RES/2200) Article 11. This Article contains the right to an adequate standard of living which includes rights to adequate food, clothing, housing, and has been read to include rights to water and to sanitation.

of poverty. Thus, the JRF report demonstrates the link between basic essentials and destitution.

The JRF report sought to ‘capture people who cannot afford to buy the absolute essentials that we all need to eat, stay warm and dry, and keep clean.’<sup>119</sup> In addition to the costs of housing, this income figure was determined to be ‘£70 for a single adult living alone, £90 for a lone parent with one child, £100 for a couple, and £140 for a couple with two children.’<sup>120</sup> This is informed by the concept of a minimum standard of living in the specific context of the UK. However, as will be explored below, the use of income measures to determine whether an individual is destitute does not adequately capture the experience of destitution.<sup>121</sup> In relation to determining a minimum income standard, this minimum standard of living is said to include, but is not limited to, ‘food, clothes and shelter.’<sup>122</sup> These are highlighted as being required in order to participate in society<sup>123</sup> and also draw parallels to the rights to food, clothing and housing.

As is made clear in figure 1 the after-housing-costs figure set by the JRF report does not align with the level of financial assistance provided under the asylum and immigration act. Although due to the fact that the statutory support is paid per person and thus benefits larger family units in this comparison, the level of statutory provision is insufficient to meet the income level set by the JRF report for family units of less than three persons. Given that the JRF report level is determined in reference to the minimum income standard, it follows that the level of statutory provision is insufficient to attain, *inter alia*, food and clothes. This indicates that the level of statutory provision may be insufficient to allow the rights to food and

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<sup>119</sup> Fitzpatrick et al. (n 2) 2.

<sup>120</sup> *ibid.*

<sup>121</sup> See section 2.3.3.

<sup>122</sup> Matt Padley and Donald Hirsch, ‘A Minimum Income Standard for the UK in 2017’ (Joseph Rowntree Foundation 2017) 3 <<https://www.jrf.org.uk/file/50351/download?token=j92YnSFfi&filetype=full-report>> accessed 15 October 2019.

<sup>123</sup> *ibid.*

clothing to be realised.

**Figure 1: Comparing post-housing costs incomes required to avert destitution**

<b>Recipient</b>	<b>AIA Level (£37.75 pp)</b>	<b>JRF Report Level</b>	<b>Percentage of JRF Level Represented by AIA Level</b>
Single adult living alone	£37.75	£70.00	53.93%
Single adult with one child	£75.50	£90.00	84.17%
A couple living together	£75.50	£100.00	75.50%
A two parent two child family unit	£150.50	£140	107.50%

### **2.3. Extreme Poverty**

It is clear that determining an individual to be destitute proscribes judgment on their standard of living. That judgment is that their standard of living is too low; their status of being human entitles them to more; and that they are impoverished and that they are experiencing a more severe form of poverty. More specifically, in considering my destitution themes once again this judgement categorises an individual who experiences destitution as not only vulnerable but as also lacking in dignity.

An examination of poverty will act as the catalyst for the analysis of survival needs, vulnerability, and indignity. This is because similarly to destitution, a determination of poverty carries these same connotations. The analysis of poverty is justified given that the experience

of destitution ‘sits within the much broader context of ‘severe’ and other forms of poverty.’<sup>124</sup> This reaffirms the suggestion that destitution is an extreme form of poverty. This is because the use of ‘broader’ in relation to poverty necessarily implies that destitution is a narrower concept than poverty. Lotter’s contention, that those living in absolute poverty eventually experience destitution,<sup>125</sup> further justifies an examination of poverty. Therefore, in seeking to enunciate a definition of destitution, poverty must be examined.

In order to inform the identification of a rights-based definition of destitution, the following analysis will consider a number of definitions of poverty. This is because ‘the choice of a definition is of practical importance in monitoring the extent of poverty and in formulating antipoverty programs.’<sup>126</sup> More so, the choice of poverty definition will determine what is meant by extreme poverty and, as a consequence, will also influence my definition of destitution.

Debate regarding defining, measuring, and combatting poverty, although old, has risen to the fore, once again, in the context of the discussions around the Sustainable Development Goals and the post-2015 development agenda.<sup>127</sup> There exists no explicit definition of poverty with it being accepted, generally according to Shyshkin, ‘that no single statistical approach can encompass all aspects and manifestations of poverty.’<sup>128</sup> Gordon et al suggest that poverty is ‘both a scientific and a moral concept’<sup>129</sup> which may have a variety of meanings ‘depending on

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<sup>124</sup> Fitzpatrick et al. (n 2) 9.

<sup>125</sup> Lotter (n 95) 1206.

<sup>126</sup> Robert A Hoppe, ‘Defining and Measuring Poverty in the Nonmetropolitan United States Using the Survey of Income and Program Participation’ (1991) 24 *Social Indicators Research* 123, 124.

<sup>127</sup> Lang and Lingnau (n 31) 402.

<sup>128</sup> VS Shyshkin, ‘Defining Poverty Thresholds in Ukraine’ (2008) 57 *Problems of Economic Transition* 13, 13.

<sup>129</sup> David Gordon et al., ‘Absolute and Overall Poverty: A European History and Proposal for Measurement’ in David Gordon and Peter Townsend (eds), *Breadline Europe: The Measurement of Poverty* (Policy Press 2000) 79–105, 91; see also Lotter (n 95) 1198.



what subject area or discourse is being examined.’<sup>130</sup> The wide variance of poverty concepts, definitions, and measures found in ‘reviews of poverty research within and between countries’<sup>131</sup> stands testament to this. Determining conclusive definitions of poverty and poverty levels is further hampered given the difficulties faced in achieving this ‘in universally applicable ways.’<sup>132</sup> Despite this, the use of the term poverty has some core connotations. This section will determine these core elements of poverty.

Pogge contends that part of the poverty experience is lacking secure access to sufficient quantities of basic necessities such as ‘safe food and water, clothing, shelter, and basic medical care.’<sup>133</sup> Others also highlight the link between poverty and access to these basic necessities.<sup>134</sup> Thus, poverty manifests ‘itself in a dense range of overlapping and interwoven economic, political and social deprivations.’<sup>135</sup> The CESCR also endorses the view that poverty relates to multi-dimensional deprivations.<sup>136</sup>

Consequently, regardless of whether a relative or the *distinguishable*<sup>137</sup> absolute approach to determining the poverty threshold is taken,<sup>138</sup> it is contended that in a broad sense

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<sup>130</sup> Gordon et al. (n 129) 91.

<sup>131</sup> John Veit-Wilson, ‘Horses for Discourses: Poverty, Purpose and Closure in Minimum Income Standards Policy’ in David Gordon and Peter Townsend (eds), *Breadline Europe: The Measurement of Poverty* (Policy Press 2000) 141–164, 158.

<sup>132</sup> Hohnholz (n 33) 58.

<sup>133</sup> Thomas Pogge, ‘Severe Poverty as a Human Rights Violation’ in Thomas Pogge (ed), *Freedom from Poverty as a Human Right* (OUP 2007) 11–53, 150.

<sup>134</sup> Alan Gewirth, ‘Duties to Fulfil the Human Rights of the Poor’ in Thomas Pogge (ed), *Freedom from Poverty as a Human Right* (OUP 2007) 219–236, 219; Deepa Narayan and others, ‘Voices of the Poor: Can Anyone Hear Us’ (OUP for the World Bank 2000) 35.

<sup>135</sup> Harsh Mander, ‘Rights as Struggle – Towards a More Just and Humane World’ in Paul Gready and Jonathon Ensor (eds), *Reinventing Development* (Zed Books 2005) 233–253, 240.

<sup>136</sup> CESCR, ‘Substantive Issues Arising in The Implementation of The International Covenant on Economic, Social and Cultural Rights: Poverty and The International Covenant on Economic, Social and Cultural Rights’ (2001) UN.Doc. E/C.12/2001/10’ (n 7) para 8.

<sup>137</sup> Stephen P Marks, ‘Poverty’ in Daniel Moeckli et al. (ed), *International Human Rights Law* (Third Edition, OUP 2018) 599.

<sup>138</sup> Relative (section 2.3.1.) and Absolute (section 2.3.2.) Poverty will be expanded upon throughout section 2.3.

poverty relates to living standards, of which ‘the poverty threshold is a generalized indicator.’<sup>139</sup> In this sense, a determination that an individual is experiencing poverty deems their life ‘to be unworthy of how humans ought to live.’<sup>140</sup> This judgment is informed by the notion of ‘the minimum standards a group of humans have implicitly agreed upon as minimally adequate for themselves.’<sup>141</sup> This relates to the idea of lack of resources and the notion that, based on this lack of resources, those experiencing poverty are those who are excluded from the ‘minimum way of life commonly accepted in their country of residence.’<sup>142</sup> As poverty also means ‘a lack of basic capacity to participate effectively in society’<sup>143</sup> it is contended that the minimum way of life required in order to avoid poverty is of a level to allow an individual to effectively participate in society. Further, the notion of living standards, as an indicator of poverty, suggests that ‘every society has standards for what is regarded as suitable styles of human living.’<sup>144</sup> Pertaining to poverty ‘suitable style of living’ can be considered in relation to the type of life a person can live and, more specifically, ‘a lack of basic means of living with dignity.’<sup>145</sup>

Nationally defined poverty lines vary between the contexts of different states and this feature makes such contextualised poverty lines preferable to more general understandings of poverty. This is because contextualised poverty lines better correspond with the reality experienced in states.<sup>146</sup> This in turn causes states to view them as more legitimate which in turn allows such contextualised poverty lines to better resonate with states than more generally

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<sup>139</sup> Shyshkin (n 128) 13.

<sup>140</sup> Lotter (n 95) 1199.

<sup>141</sup> *ibid.*

<sup>142</sup> Shyshkin (n 128) 13.

<sup>143</sup> John Langmore, ‘Reducing Poverty: The Implications of the 1995 Copenhagen Agreement for Research on Poverty’ in David Gordon and Peter Townsend (eds), *Breadline Europe: The Measurement of Poverty* (Policy press 2000) 35–47, 37.

<sup>144</sup> Lotter (n 95) 1200.

<sup>145</sup> Danwood Mzikenge Chirwa, ‘Privatization and Freedom from Poverty’ in Geraldine Van Bueren (ed), *Freedom from Poverty as a Human Right* (UNESCO Publishing 2010) 299–318, 301.

<sup>146</sup> Lang and Lingnau (n 31) 404.

applicable definitions.<sup>147</sup>

Poverty, as an individual's existence below this minimum way of life, manifests itself in a variety of ways. This includes lack of income and/or resources with which to live sustainably. This in turn contributes to individuals experiencing other aspects of poverty, *inter alia*, hunger, ill health, limited or lack of access to basic services, and 'increased morbidity and mortality from illness.'<sup>148</sup> This demonstrates the role that poverty can play in multiplying deprivations and causing an individual to experience deteriorating conditions.<sup>149</sup>

### **2.3.1. Relative Poverty**

Relative, also referred to as subjective,<sup>150</sup> definitions of poverty determine context specific thresholds, usually of average incomes,<sup>151</sup> below which an individual or a household are determined to be in poverty. Relative approaches to poverty are therefore influenced by, and linked to,<sup>152</sup> the standards of living within a state. Thus, relative concepts of poverty are based on the notion that poverty cannot be fixed at one subsistence level 'and that, as overall living standards rose over time, so too should our understanding of what it means to be poor.'<sup>153</sup>

In any state where there is a disparity in incomes and living standards relative poverty exists. This is because deprivation will be determined by the standards of that specific state.<sup>154</sup> One approach to determining a relative poverty line, used by the European Union and the Organisation for Economic Co-operation and Development (OECD) is to 'set poverty lines as

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<sup>147</sup> *ibid.*

<sup>148</sup> 'Chapter II: Eradication of Poverty (1995) UN.Doc. A/CONF.166/9' para 19.

<sup>149</sup> Klaus Funken and Penny Cooper, *Old and New Poverty* (River Oram Press 1995) 27.

<sup>150</sup> For the sake of clarity, I will use the term relative poverty throughout this thesis. However, the term relative poverty is synonymous with subjective poverty.

<sup>151</sup> Pete Alcock, *Why We Need Welfare* (Policy Press 2016) 37.

<sup>152</sup> Didier Fouarge, *Poverty and Subsidiarity in Europe* (Edward Elgar 2004) 115.

<sup>153</sup> Alcock (n 151) 36.

<sup>154</sup> Funken and Cooper (n 149) 50.

a share of the median income in a given country.’<sup>155</sup> This is often set at sixty-percent of the median income.<sup>156</sup> Armstrong purports that the use of the median average is appropriate as the median value is not affected by extremely low or extremely high incomes.<sup>157</sup> This is because the median value, in this scenario, is the middle income when, for ease of understanding, all the incomes within a given group are lined up in ascending order. Thus, even if all the incomes below the median value are raised to the same level, but are still lower than the median value, the median will stay the same.<sup>158</sup>

Consequently, I can envision a society in which, using a relative income-based approach to poverty, individuals are considered to be experiencing poverty despite having each of their human rights realised fully. Take for example an admittedly utopian society where the lowest incomes are enough for a person to afford necessities, to meet their living costs, and to partake in all activities which they may wish to do. See Figure 2 for an example of this. Consider still that these lowest incomes are significantly lower than the median average of incomes within that society, and far below the 60% of national median income used by the European Union in determining the at-risk-of-poverty line.<sup>159</sup>

In such a society, extreme income inequality does exist, and those on the lowest incomes, by current definitions would be regarded as living in relative poverty, or at least as being at-risk-of-poverty. However, the poverty experienced by those living in such a state would be a very different poverty experience in comparison to those currently living in the European Union and subject to the 60% of median income definition of being at risk of poverty. This demonstrates the potential of relative poverty approaches to ‘account for the important

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<sup>155</sup> Lang and Lingnau (n 31) 405.

<sup>156</sup> Stephen Armstrong, *The New Poverty* (Verso 2017) 22.

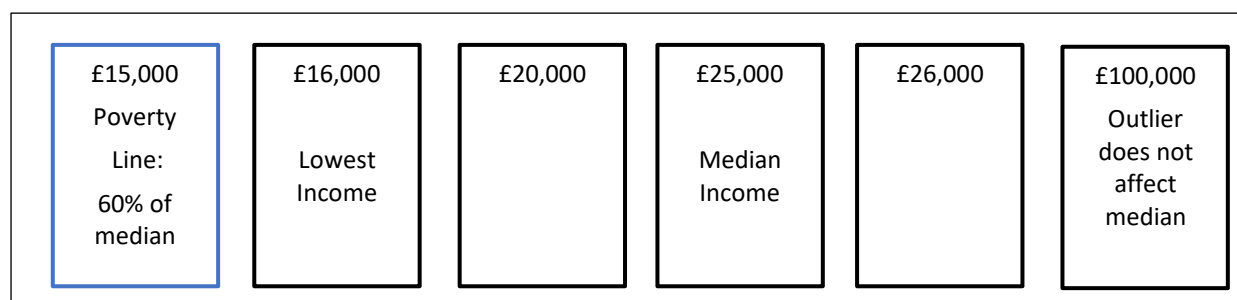
<sup>157</sup> *ibid.*

<sup>158</sup> *ibid.*

<sup>159</sup> Lang and Lingnau (n 31) 405.

link between poverty and inequality.’<sup>160</sup>

**Figure 2: Conceptualising the Median Income**



On the discussion in the preceding paragraph, it is clear that relative approaches to poverty allow poverty to be ‘defined by society itself.’<sup>161</sup> Gordon labels this as the relative approach’s ‘most important advantage.’<sup>162</sup> This is advantageous as it ‘links the extent and the experience of poverty to the position of people within the broader social order.’<sup>163</sup> In this sense, such an approach may be more representative of the ‘poverty experience’ than universal levels, which will be addressed below. This is because relative approaches ‘account for the evolution of *perceptions* of basic needs evolving in society.’<sup>164</sup>

Emphasis must, however, be placed upon the phrase ‘*perceptions* of basic needs.’ This is because society’s perception of basic needs may diverge from the basic needs themselves. This divergence may occur as relative approaches are not only informed by society’s perceptions but also emphasise this perception over the actual basic needs.<sup>165</sup> For example, the average of a 1992 survey of a sample of Americans was ‘76 percent higher than the official

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<sup>160</sup> *ibid.*

<sup>161</sup> Christopher Muller, ‘Defining Poverty Lines as a Fraction of Central Tendency’ (2006) 72 *Southern Economic Journal* 720, 720.

<sup>162</sup> David Gordon, ‘Measuring Absolute and Overall Poverty’ in David Gordon and Peter Townsend (eds), *Breadline Europe: The Measurement of Poverty* (Policy Press 2000) 49–77, 57–58.

<sup>163</sup> Alcock (n 151) 38.

<sup>164</sup> Muller (n 161) 720.

<sup>165</sup> Gordon (n 162) 61. Gordon highlights ‘that the elucidation of opinion takes precedence over the elucidation of behaviour.’

poverty level.’<sup>166</sup> This demonstrates that a disjunction can exist between perceptions of basic needs and a universal understanding of basic needs. Further still, this example shows how relative approaches have the potential to classify more individuals as experiencing poverty. This is because in setting a higher income-based poverty line such approaches would classify more individuals as being in poverty. This may perhaps be explained by the fact that those experiencing poverty and those who are not have different perceptions as to what constitutes basic necessities with the more comfortable amongst us, having not experienced poverty, failing to fully grasp how little the impoverished have. Even if this is the case, such approaches demonstrate that society believes that those who do not have access to, even this broader conception of, basic necessities are impoverished.

Another approach taken by the World Bank uses the experiences of those in poverty. Through the involvement of those experiencing poverty, who were regarded as the primary stakeholders,<sup>167</sup> the World Bank developed the Participatory Poverty Assessment (PPA). Used in the Voices of the Poor assessment of poverty, the PPA approach determined six main findings.<sup>168</sup> I highlight those findings which relate to the definition of poverty. These were: that poverty is multidimensional; that poverty is ‘the lack of multiple resources that leads to hunger and physical deprivation’; and that poverty creates vulnerability.<sup>169</sup> This approach, unlike the example cited in the preceding paragraph, utilised the experience of impoverished individuals. More so, this report did not seek to place an income-based classification on poverty. Instead, it represents key aspects of the poverty experience as determined, in part, by those experiencing impoverishment. Thus, it may be regarded as more accurately depicting the poverty experience.

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<sup>166</sup> Rodger Doyle, ‘Defining Poverty’ (2003) 288 Scientific America 21, 31.

<sup>167</sup> Narayan and others (n 134) 15.

<sup>168</sup> *ibid* 31.

<sup>169</sup> *ibid*.

### 2.3.2. Absolute Poverty

Relative poverty contrasts to absolute, also known as objective,<sup>170</sup> approaches to poverty which ‘is technically defined as poverty measured against a fixed standard.’<sup>171</sup> This fixed standard is ‘clearly based on some notion of basic needs.’<sup>172</sup> Consequently, absolute poverty is ‘sometimes referred to as subsistence poverty’<sup>173</sup> and ‘portrays a particularly severe condition suffered by humans.’<sup>174</sup> This notion of severity is represented in that an individual can only be said to be experiencing absolute poverty when they do ‘not reach an absolute minimum level of resources.’<sup>175</sup>

The World Summit for Social Development can be used in determining which resources constitute a part of this ‘absolute minimum level.’ The programme of action defined absolute poverty as ‘a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to social services.’<sup>176</sup> This definition highlights a number of basic human needs. Some of these highlighted needs can be joined together under the umbrella of health. Lotter contends that an individual experiences absolute poverty if they do not have ‘sufficient economic capacities to ward off a decline in physical health.’<sup>177</sup> Further, various measurements can be utilised in determining whether such a decline has taken place. These include, *inter alia*, ‘loss of weight due to lack of enough food, weight gain as result of

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<sup>170</sup> For the sake of clarity, I will use the term absolute poverty throughout this thesis. However, the term absolute poverty is synonymous with objective poverty.

<sup>171</sup> Langmore (n 143) 36.

<sup>172</sup> Fouarge (n 152) 115.

<sup>173</sup> Alcock (n 151) 36.

<sup>174</sup> Lotter (n 95) 1202.

<sup>175</sup> Fouarge (n 152) 115.

<sup>176</sup> ‘Chapter II: Eradication of Poverty (1995) UN.Doc. A/CONF.166/9’ (n 148) 19; see also Langmore (n 143) 36; Lotter (n 95) 1205.

<sup>177</sup> Lotter (n 95) 1203–1204.

lack of resources to procure food providing adequate nutrition, increased susceptibility to disease.’<sup>178</sup> This focus on *physical* health excludes other deprivations of basic needs found in the programme of action definition, such as education and information. Lack of access to these necessities, although negatively impactful upon an individual’s life, would not necessarily affect an individual’s physical health. As such, this definition does not go far enough.

More so, focusing on physical health alone excludes the implications that experiences of poverty may have on an individual’s mental and social wellbeing. The World Health Organization (WHO) defines health as ‘a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity.’<sup>179</sup> Therefore, it is clear that an individual’s health goes beyond physical health alone. As such, to focus purely on a decline in physical health too narrowly defines poverty. This is because a lack of sufficient economic capabilities to maintain mental and social wellbeing, as well as to ward off declines in physical wellbeing, are required to maintain an individual’s health. Therefore, an individual must be regarded as in poverty if their economic capabilities do not reach this higher standard.

Unlike the relative approach, absolute poverty is adjudged independently to the individual’s environment.<sup>180</sup> Dissimilarly, therefore, to the hypothetical utopia envisioned above, absolute conceptions of poverty allow for societies to be regarded as poverty free. That is, when all individuals are able to meet their basic needs. Therefore, absolute approaches to poverty are capable of providing a ‘universally applicable baseline of poverty.’<sup>181</sup> The same cannot be said of relative conceptions of poverty. The choice of poverty line, in regard to absolute income set in terms of dollars per day, affects the number of people classified as poor.

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<sup>178</sup> *ibid.*

<sup>179</sup> World Health Organisation WHO, ‘Constitution of WHO: Principles’ <<https://www.who.int/about/mission/en/>> accessed 3 January 2019.

<sup>180</sup> Fouarge (n 152) 115.

<sup>181</sup> Lotter (n 95) 1206.



This is because the choice of a higher poverty line such as \$2, as opposed to the absurdly low international poverty line of \$1.25, would ‘find that the number of poor has stood still or has actually slightly increased.’<sup>182</sup> In 2015 the World Bank set the international poverty line at US\$1.90 per day with this figure being determined using the ‘average of the national poverty lines in the poorest 15 countries.’<sup>183</sup> However, because of this the World Bank’s extreme poverty standard ‘is inadequate for capturing the realities of poverty on the ground’<sup>184</sup> and excludes, by definition, ‘all poverty in developed countries.’<sup>185</sup>

Perhaps on account of this, absolute conceptions of poverty are disputed.<sup>186</sup> One reason for this is that the universality of definitions of poverty, which are absolute in nature, relies on the concept of basic needs. This is because it is adjudged that these basic needs can transpose between contexts as, in being linked to subsistence, an absolute poverty line does not alter as societal living standards increase.<sup>187</sup> This is based on the assumption that individuals require the same basic necessities in order to survive.<sup>188</sup> Even if such an assumption is valid, difficulties arise in determining the content and extent of this nature of basic necessities with guiding phrases such as ‘minimal standard of living’ being not at all clear.<sup>189</sup>

Another reason for this is the view that definitions of poverty so conceived do not fully capture the ‘poverty experience.’ For example, Lotter contends that, although useful in gauging a baseline for severe forms of poverty, an absolute conception of poverty must ‘be

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<sup>182</sup> Thomas Pogge, ‘Keynote Address: Poverty, Climate Change, and Overpopulation’ (2010) 38 *Georgia Journal of International and Comparative Law* 525, 530.

<sup>183</sup> Marks (n 137) 599.

<sup>184</sup> Phillip Alston, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (2014) UN.Doc. A/69/297 para 7.

<sup>185</sup> *ibid.*

<sup>186</sup> Gordon (n 162) 50.

<sup>187</sup> Fouarge (n 152) 115.

<sup>188</sup> Lotter (n 95) 1203–1204.

<sup>189</sup> *ibid* 1205.

supplemented by a second kind of definition.’<sup>190</sup> Herein lies the weakness of absolutist conceptions of poverty. Such conceptions are ‘often dominated by the individual’s requirements for physiological efficiency’<sup>191</sup> tending ‘to be prescriptive definitions based on the ‘assertions’ of experts about people’s minimum needs.’<sup>192</sup> Not only may these ‘assertions’ be incorrect, but they also firmly attach the notion of poverty to mere subsistence and survival. This implies that those who are just above this poverty line are not living in poverty despite the fact that their experience is not at all dissimilar to those living just below this baseline. It further suggests that this first category of individuals are living lives befitting of their status as individuals. I refute this suggestion. Seeborn Rowntree moved away from such a narrow, subsistence-based definition, of poverty given that ‘society’s ideas of what equated to ‘obvious want and squander’ had changed.’<sup>193</sup> I endorse such an approach.

### ***2.3.3. Linking Relative and Absolute Approaches to Poverty: Income-based measurements***

Despite the differences between the relative and absolute approaches to poverty some common themes can be extrapolated. Ultimately poverty is about a ‘continuum of want’<sup>194</sup> which contributes to an ‘inability to attain a minimal standard of living’<sup>195</sup> with both the absolute and relative approaches to poverty being a mechanism through which this minimal standard is determined. Consequently, when given a choice of poverty standard ‘governments almost invariably choose those that report the lowest number of poor people.’<sup>196</sup>

In defining poverty, a choice must be made ‘between whether poverty ought to be about

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<sup>190</sup> *ibid* 1207.

<sup>191</sup> Gordon (n 162) 50.

<sup>192</sup> *ibid*; see also Fouarge (n 152) 115.

<sup>193</sup> Carol Walker, *Managing Poverty: The Limits of Social Assistance* (Routledge 1993) 50.

<sup>194</sup> George and Howards (n 42) 1.

<sup>195</sup> Funken and Cooper (n 149) 43.

<sup>196</sup> John Dixon and David Macarov, *Poverty: A Persistent Global Reality* (Routledge 1998) 269.

relative deprivation or subsistence needs.’<sup>197</sup> In my view, the fundamental difference between absolute and relative definitions of poverty is their outcome. These definitions ‘result in very different measures of the numbers of people who are poor in society.’<sup>198</sup> Pryke labels those who prefer the relative approach to poverty as ‘poverty-wallahs’<sup>199</sup> and states that ‘their aim has been to show that the extent of poverty is worse than it appears.’<sup>200</sup> Pryke’s argument can be summarised as being one which contends that only absolute poverty measures ought to be used and, as such, no problem of mass-poverty can be said to exist in the context of more developed nations such as the UK.<sup>201</sup>

Regardless of which approach is utilised, both traditional relative and absolute conceptions of poverty are determined, not by rights, but by income-based measures with poverty being regarded as the income level separating ‘the poor from the not poor.’<sup>202</sup> This income level, however, varies depending upon the approach to poverty taken. This is because a relative approach determines the level of income based on such factors as 60% of the median income whereas the absolute approach determines the income level based upon an assessment of how much income is required to meet very basic needs; that is to subsist. However, the extent to which \$1.90 per day can allow an individual to subsist in more developed contexts such as the UK must be challenged.

Poverty continues to be perceived exclusively, by many legal systems, as the income poverty of individuals.<sup>203</sup> This is evidenced through the fact that poverty rates have come to be

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<sup>197</sup> Bill Jordan, *A Theory of Poverty and Social Exclusion* (Policy press 1996) 94.

<sup>198</sup> Alcock (n 151) 36; see also Robert J Samuelson, ‘Defining Poverty Up’ (2010) 155 *Newsweek*.

<sup>199</sup> Richard Pryke, ‘Poverty-Wallahs, the Underclass and Incentives 33-44, 33’ in John Clark et al. (ed), *Welfare Work and Poverty* (The Cromwell Press 2000) 33–44, 33.

<sup>200</sup> *ibid*.

<sup>201</sup> *ibid* 43.

<sup>202</sup> Doyle (n 166) 31.

<sup>203</sup> Savitri Goonesekere, ‘Civil and Political Rights and Poverty Eradication’ in Geraldine Van Bueren (ed), *Freedom from Poverty as a Human Right* (UNESCO Publishing 2010) 51–78, 52.

‘defined in terms of household income.’<sup>204</sup> Thus, poverty and deprivation have been reduced to a shortage of money.<sup>205</sup> This is understandable in that lack of money, and income, can contribute to an individual being unable to access the basic necessities required in order to not experience poverty.<sup>206</sup> Further still, income is easy to measure and is therefore a convenient method of poverty identification.<sup>207</sup> This may go some way to explaining why it is the preferred means of measuring poverty in both absolute and relative conceptions.

Yet, this disregards and is despite the fact that, income-based measurements of poverty assess only one aspect of deprivation.<sup>208</sup> Poverty is ‘broader than income data’ alone.<sup>209</sup> Consequently, such a method of determining poverty has been criticised ‘for using arbitrary thresholds as proxies for poverty.’<sup>210</sup> Building on this, income-only-based measurements of poverty have been criticised by Skogly in that they are incapable of capturing the significance and complexity of ‘the rights of the poor and the violations thereof.’<sup>211</sup> Sen also posits that ‘the reduction of income poverty alone cannot possibly be the ultimate motivation of antipoverty policy.’<sup>212</sup>

Even so, income does have a role to play in regard to poverty, with poverty as a deprivation of capabilities<sup>213</sup> and income deprivations often having ‘considerable correlational linkages.’<sup>214</sup> This is demonstrated through the notion of income being a ‘means to

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<sup>204</sup> Duncan Gallie, ‘The Quality of Working Life in Welfare Strategy’ in Gosta Esping-Andersen et al. (ed), *Why We Need a New Welfare State* (OUP 2002) 96–129, 104.

<sup>205</sup> Pauline Ashley, *The Money Problems of the Poor* (Heinemann Educational Books Ltd 1983) 2.

<sup>206</sup> McFate et al. (n 17) 137.

<sup>207</sup> Marks (n 137) 600.

<sup>208</sup> George and Howards (n 42) 57.

<sup>209</sup> Marks (n 137) 600.

<sup>210</sup> Donald and Mottershaw (n 25) 12.

<sup>211</sup> Skogly (n 18) 63.

<sup>212</sup> Sen (n 37) 92.

<sup>213</sup> See section 2.3.4.

<sup>214</sup> Sen (n 37) 20.

capabilities’<sup>215</sup> and, inversely, the notion that ‘deprivation of individual capabilities can have close links with the lowness of income.’<sup>216</sup> As the notion of adequate income is contained in various international instruments some poverty activists argue that a lack of such an adequate income ‘represents the denial of human rights.’<sup>217</sup>

#### **2.3.4. Linking Poverty and Human Rights: Development and Capability**

Poverty, defined in relation to human rights, also gives rise to Sen’s ‘seminal’<sup>218</sup> concept of capabilities, which in turn gives rise to the concept of development. Building upon this, poverty has been described by Sengupta as ‘the absence or the violation of the right to development of the category of people identified as ‘poor’.’<sup>219</sup> The declaration on the right to development ‘does not address poverty as such, although elimination of poverty is implicit in concepts’<sup>220</sup> contained within. The Millennium Development Goals confirmed the long-standing acceptance of the importance of a number of human rights, inter alia food and health, to poverty reduction.<sup>221</sup> This demonstrates some of the links between human rights and development.

This in turn allows human rights-based definitions of poverty to be linked to capabilities given the mutual characteristics, in the form of motivations and goals, which are shared between the promotion of human development and the realisation of human rights.<sup>222</sup> This relates especially to ‘guaranteeing the basic freedoms that people have reason to value.’<sup>223</sup>

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<sup>215</sup> *ibid* 90.

<sup>216</sup> *ibid* 19.

<sup>217</sup> Lister (n 29) 116.

<sup>218</sup> Mander (n 135) 241.

<sup>219</sup> Sengupta (n 27) 338–339.

<sup>220</sup> Marks (n 137) 614.

<sup>221</sup> Margaret Bedggood and Diane Frey, ‘Work Rights: A Human Rights-Based Response to Poverty’ in Geraldine Van Bueren (ed), *Freedom from Poverty as a Human Right* (UNESCO Publishing 2010) 79–112, 79.

<sup>222</sup> UNDP, *Human Development Report 2000* (n 21) 19.

<sup>223</sup> *ibid* 20.

Premised on the notion that development should be informed by attention to human rights, rights-based approaches to development are nowadays widely endorsed.<sup>224</sup> This is further supported in that the UNDP has recognised that a number of development goals are not only goals but are also human rights.<sup>225</sup>

Therefore, development must also be considered given that the UNDP states that human development is ‘integrally connected with enhancing certain capabilities.’<sup>226</sup> Consequently, given the links between human rights, poverty, and capability which have already been highlighted, development must also be considered in relation to determining a human rights definition of poverty. Human rights and development share a common purpose of human welfare<sup>227</sup> and the human development approach, as represented by the human development index, demonstrates this.

A multi-dimensional and human rights-based definition of poverty, in drawing on the work of Sen, can be defined as ‘the lack of basic capabilities to live in dignity.’<sup>228</sup> This notion of dignity is both a feature of capability poverty and is a destitution theme. This demonstrates the suitability of capability poverty in considering destitution. The lack of such basic capabilities equates to the ‘sustained or chronic deprivation of resources, capabilities, choices, security, and power necessary for the enjoyment of an adequate standard.’<sup>229</sup> Osmani demonstrates the linkage between poverty and human rights which the concept of capability,

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<sup>224</sup> Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP 2005) 91.

<sup>225</sup> UNDP, *Human Development Report 2000* (n 21) 73. For example, ‘a decent standard of living, adequate nutrition, health care and other social and economic achievements’

<sup>226</sup> *ibid* 19.

<sup>227</sup> Marks (n 137) 616–617.

<sup>228</sup> Bedggood and Frey (n 221) 82.

<sup>229</sup> *ibid*.

as a connecting bridge,<sup>230</sup> allows to be achieved. This is achieved through the joint contentions that: poverty is the failure of basic capability rights; of which many human rights may be regarded. Therefore, poverty can be interpreted as the non-realisation, or in fact denial, of a range of human rights.<sup>231</sup> This rests on the ‘very close relationship’ which exists between capabilities and human rights.<sup>232</sup> However, poverty does not denote the experience of the non-realisation, or violation, of all human rights. Although a deprivation can be said to have occurred, this may not always equate to poverty which must be ‘understood in the context of social policy.’<sup>233</sup> This is because only some capability failures constitute poverty.<sup>234</sup>

In regard to relative and absolute concepts of poverty Sen claims ‘that absolute deprivation in terms of a person’s capabilities relates to relative deprivation in terms of commodities, incomes and resources.’<sup>235</sup> Thus, the capability approach to poverty can reconcile relative and absolutist conceptions of poverty. This is achieved through the notion of there being ‘an irreducible absolutist core in the idea of poverty’<sup>236</sup> below which, regardless of the relative situation, poverty can be said to exist. Examples of being below this core, cited by Sen, are starvation and hunger.<sup>237</sup>

Capabilities are the substantive freedoms an individual enjoys to live the kind of life that individual has reason to value<sup>238</sup> with capabilities, as means to other human ends, being

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<sup>230</sup> Siddiqur Rahman Osmani, ‘Poverty and Human Rights: Building on the Capability Approach’ in Diane Elson et al. (ed), *Human Rights and the Capabilities Approach* (Routledge 2012) 193–207, 202.

<sup>231</sup> *ibid* 195.

<sup>232</sup> Martha C Nussbaum, ‘Capabilities, Entitlements, Rights: Supplementation and Critique’ in Diane Elson et al. (ed), *Human Rights and the Capabilities Approach* (Routledge 2012) 23–37, 23.

<sup>233</sup> Osmani (n 230) 202.

<sup>234</sup> *ibid*.

<sup>235</sup> Amartya Sen, *Resources, Values and Development* (Basil Blackwell 1984) 326.

<sup>236</sup> *ibid* 332.

<sup>237</sup> *ibid*.

<sup>238</sup> Sen (n 37) 87.

‘directly valuable in a way that the possession of primary goods cannot be.’<sup>239</sup> The capability approach to poverty regards poverty ‘as the deprivation of *basic* capabilities.’<sup>240</sup> Capability is the freedom to achieve functionings which in turn are defined as ‘things we value doing or being.’<sup>241</sup> Examples of functionings include ‘being in good health, being literate or educated, being able to participate in the life of the community, being free to speak, being free to associate and so on.’<sup>242</sup> Beyond this list, Sen states that the capability to function ‘comes closest to the notion of standard of living.’<sup>243</sup> Thus capability is the extent to which an individual’s pursuit of these functionings are respected, protected and fulfilled.

Once again, as these basic capabilities parallel the rights enshrined in international human rights law,<sup>244</sup> a correlation can be made to a number of human rights: the rights to health, education, participation, freedom of expression, and freedom of association. Further still, Sengupta highlights the three ‘basic’<sup>245</sup> rights to food, health and education as requiring prioritisation, albeit alongside the non-retrogression and non-violation of other rights, under the capability approach.<sup>246</sup> The notion of these being basic capabilities perhaps relates to the contention that the rights to food and health, amongst others, have been interpreted as rights to capability building.<sup>247</sup> Thus some rights allow capabilities to be accessed and built. Amongst other rights, the right to housing and the right to sanitation are also highlighted.<sup>248</sup> This

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<sup>239</sup> Sen (n 235) 323.

<sup>240</sup> Sen (n 37) 87.

<sup>241</sup> Sengupta (n 16) 851.

<sup>242</sup> *ibid.*

<sup>243</sup> Sen (n 235) 334.

<sup>244</sup> Van Bueren (n 41) 1.

<sup>245</sup> Sengupta (n 16) 886.

<sup>246</sup> *ibid.*

<sup>247</sup> UNDP, *Human Development Report 2000* (n 21) 34.

<sup>248</sup> Sengupta (n 16) 887.



correlation is highlighted to add credence to the contention that poverty relates to the non-realisation of human rights which are ‘essentially related’<sup>249</sup> to capability. This is because Sen’s understanding of poverty suggests that poverty is the deprivation of basic capabilities.

As basic capabilities have been linked to human rights it follows that the deprivation of basic capabilities equates to the deprivation of human rights. Thus, in defining poverty as the failure of basic capability rights, of which many basic human rights have been seen as, ‘poverty can be seen as the denial of human rights.’<sup>250</sup> On top of this, the UNDP highlights the links between various necessities and suggests that ‘building capabilities in one generation is a means to securing social and economic rights in the next—and to eradicating poverty in the long term.’<sup>251</sup> Therefore, capability building is clearly important to tackling poverty.

## **2.4. Destitution Themes**

As the analysis of poverty above has made clear, a human rights-based approach to destitution can be based upon human rights-based approaches to poverty, albeit with a narrower focus. This narrowing of focus must be centred around the destitution themes of survival needs, vulnerability, and indignity which have permeated throughout the analysis in this chapter thus far.

### **2.4.1. Survival Needs**

Bonomo suggests that within needs-based approaches to poverty,<sup>252</sup> the more variables (needs) used within the measurement of poverty increases the quantity of those considered to be

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<sup>249</sup> *ibid* 885.

<sup>250</sup> Osmani (n 34) 217.

<sup>251</sup> UNDP, *Human Development Report 2000* (n 21) 76.

<sup>252</sup> A basic needs approach to poverty defines ‘the basic needs and the relative minimum levels of satisfaction; Select variables and indicators that express different levels of satisfaction; Define a minimum level for every indicator below which the needs are considered unsatisfied; and Classify the families as ‘poor,’ when one or more basic needs are not met.’ see Luciano Bonomo, ‘Not Only a Poverty Issue Defining Poverty Assessment for Microfinance Institutions: A Framework to Discuss’ (2010) 9 *Perspectives on Global Development and Technology* 392, 397.

experiencing poverty.<sup>253</sup> This correlation can be transferred into the context of human rights to state that the more human rights identified as being part of the poverty definition, the more poverty will be found to exist. The focus on poverty, in relation to destitution for the purposes of this thesis, relates specifically to ‘extreme poverty’. Extreme poverty is characterised by the adoption of a ‘survival culture’ in which individuals adapt and devote all of their energy to their struggle for survival.<sup>254</sup> This notion of survival needs has already been highlighted as part of Gangopadhyay et al’s conception of traditional destitution interpretations. It follows that as destitution is separated from poverty through a notion of extremity, based upon survival needs, that survival needs are the key differentiating factor between poverty and destitution. On account of this, survival needs can be used as a tool in the process of identifying my rights-based definition of destitution.

The concept of survival needs can therefore act as a filter in determining which rights constitute component rights of a human rights-based definition of destitution. This concept highlights a number of rights which may be relevant to destitution: basic or survival rights which are also referred to as subsistence rights.<sup>255</sup> This is because such rights have been demonstrated to be those which are considered to be unrealised in conditions of extreme poverty. In linking destitution with the conjoined themes of poverty and survival needs, the previous sections have highlighted a category of rights of which the inclusion within a rights-based definition of destitution readily aligns with traditional conceptions of destitution. These rights are survival rights.

Survival rights can act as a filter in highlighting the component rights of a destitution

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<sup>253</sup> *ibid.*

<sup>254</sup> Eide, ‘Obstacles and Goals to Be Pursued’ (n 38) 557.

<sup>255</sup> Gilles Giacca, *Economic, Social and Cultural Rights in Armed Conflict* (OUP 2014) 31.

definition as these rights are a separate question to ‘broader economic rights’<sup>256</sup> more generally. Bilchitz highlights that in its general comments the CESCR has ‘adopted and modified Henry Shue’s framework concerning the range of obligations can be said to flow from fundamental socio-economic rights.’<sup>257</sup> Alegre highlights that Shue has named such rights as ‘basic’ rights.<sup>258</sup> As subsistence and basic rights are synonymous it follows that Shue’s exploration of basic rights can be considered in relation to the notion of survival needs. Therefore, Shue’s basic rights framework can aid in informing the identification of my rights-based destitution definition.

The process of identifying and measuring basic needs varies greatly.<sup>259</sup> Shue recognises that this makes it difficult to determine what is necessary for survival. Even so, ‘the basic idea is to have available for consumption what is needed for a decent chance at a reasonably healthy and active life of more or less normal length, barring tragic interventions.’ To identify the component rights, it must therefore be determined which resources, and which associated rights constitute basic needs. To identify the destitution threshold, the level of realisation required to meet basic needs free from vulnerability and indignity must be determined. Basic rights, according to Shue, are ‘the line beneath which no one is allowed to sink;’<sup>260</sup> ‘everyone’s minimum reasonable demands upon the rest of humanity;’<sup>261</sup> and more distinctively rights of which the enjoyment, and realisation, is ‘essential to the enjoyment of all other rights.’<sup>262</sup>

Although there is no agreed list of needs, the concept of human needs ‘is based on the

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<sup>256</sup> Henry Shue, *Basic Rights* (Second Edition, Princeton University Press 1996) 23.

<sup>257</sup> David Bilchitz, *Poverty and Fundamental Rights* (OUP 2007) 184.

<sup>258</sup> Alegre (n 23) 237.

<sup>259</sup> Upendra Baxi, ‘International Development, Global Impoverishment, and Human Rights’ in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 597–613, 600.

<sup>260</sup> Shue (n 256) 18.

<sup>261</sup> *ibid* 19.

<sup>262</sup> *ibid*; This final criterion has been reiterated by Alegre see also; Alegre (n 23) 237–238.

idea that there are certain essentials necessary for survival'<sup>263</sup> which go beyond food, water and shelter to also include 'those things humans are instinctively driven to attain.'<sup>264</sup> Shue equates subsistence to 'minimal economic security' and defines this as; unpolluted air and water; adequate food, clothing, and shelter; and 'minimal preventive public health care.'<sup>265</sup> Thus these are the resources which constitute Shue's basic rights. Beyond this, Sengupta highlights not only the necessities that are food, water, clothing and shelter but also the ability to purchase these necessities when lacking access to them.<sup>266</sup> Thus the individual's ability to access the necessities is also of importance in the assessment of whether an individual is having their basic needs met.

On top of this, as Special Rapporteur on extreme poverty and human rights, Alston has suggested that a right to social protection exists as a combination of the right to social security and the right to an adequate standard of living.<sup>267</sup> I contend that social protection can be considered alongside basic needs and that consequently the rights to social security and to an adequate standard of living are important to the realisation of basic needs.

The need to consider basic needs as basic rights can be justified in that human beings have 'certain compelling interests'<sup>268</sup> which are of such importance as to justify 'being given protection as rights.'<sup>269</sup> These compelling interests can be positioned within human rights-

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<sup>263</sup> Dawn Walsh, 'How a Human Needs Theory Understanding of Conflict Enhances the Use of Consociationalism as a Conflict Resolution Mechanism: The Good Friday Agreement in Northern Ireland' (2016) 15 *Ethnopolitics* 285, 286.

<sup>264</sup> *ibid.*

<sup>265</sup> Shue (n 256) 23.

<sup>266</sup> Sengupta (n 27) 335–336.

<sup>267</sup> Alston, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' (n 184) para 34.

<sup>268</sup> Bilchitz, *Poverty and Fundamental Rights* (n 257) 48.

<sup>269</sup> *ibid.*

discourse given the potential impact of going without these basic needs and necessities.<sup>270</sup> Furthermore, building upon the notion of the enjoyment of basic rights being important to the realisation of other rights, Shue proposes that these basic rights are essential parts of other rights and are ‘inherent necessities.’<sup>271</sup>

This is perhaps indicative of a hierarchy between rights. Griffiths highlights Maslow as a proponent of the hierarchal view; with this view prioritising ‘basic items of food, water and shelter’<sup>272</sup> followed by other needs and although some have argued that this is the case,<sup>273</sup> others have disputed this.<sup>274</sup> This may be because such a contention may be regarded as undermining the interdependence and indivisibility of rights. Osmani, however, suggests that such a prioritisation, admitting only the non-realisation of some rights as poverty, does not undermine the indivisibility of rights.<sup>275</sup> In relation to this thesis, I am attempting to determine a rights-based definition not of poverty but instead of destitution. From the outset of this chapter, I have regarded destitution as an *extreme* form of poverty. It is logical therefore, in determining what separates the extreme poverty of destitution from poverty more broadly, that not all rights will constitute component rights of the destitution definition.

#### **2.4.2. Vulnerability**

Vulnerability, as a concept, ‘assumes partially different senses’<sup>276</sup> in different fields and there exists no pure conceptual understanding of the meaning ‘vulnerable group in International

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<sup>270</sup> Elizabeth Ashford, ‘The Duties Imposed by the Human Right to Basic Necessities’ in Thomas Pogge (ed), *Freedom from Poverty as a Human Right* (OUP 2007) 183–218, 183.

<sup>271</sup> Shue (n 256) 26.

<sup>272</sup> Martin Griffiths, ‘John Burton Versus International Relations: The Costs of Criticism’ (2013) 67 *Australian Journal of International Affairs* 55, 63.

<sup>273</sup> *ibid*; Walsh (n 263) 286.

<sup>274</sup> Griffiths (n 272) 63; Walsh (n 263) 286.

<sup>275</sup> Osmani (n 230) 206.

<sup>276</sup> María Del Carmen Barranco Avilés, ‘Human Rights and Vulnerability. Examples of Sexism and Ageism’ (2015) 5 *The Age of Human Rights Journal* 29, 29.

Law.’<sup>277</sup> For the purposes of this thesis, I consider those experiencing destitution to be experiencing vulnerability. More so, I contend that with regard to destitution vulnerability has a dual manifestation and I use the concept of vulnerability to encapsulate two experiences.

In the first sense, an individual is vulnerable when they cannot attain the substance of their basic needs. This is because in not having these needs met, for example *inter alia*, housing, food, water, sanitation, and clothing, an individual is at increased risk of harm. Vulnerability so conceived can be justified on the grounds that there exists a ‘normative assumption that vulnerability causes economic insecurity and a reduction of welfare.’<sup>278</sup> This assumption justifies the contention that vulnerability ‘should be a central component of public actions to ensure a minimum level of economic and social protection.’<sup>279</sup> This notion of a minimum level of social protection links directly to my conception of destitution as discussed above.<sup>280</sup> As well as this, Turner claims that the ESCRs within the ICESCR ‘are designed to protect them from their vulnerability—from the afflictions and perturbations to which we are subject as embodied creatures’.<sup>281</sup> The criticism that such a conception of vulnerability is ‘limited by its inability to explain the individual rights of liberalism’<sup>282</sup> can be nullified, for the purposes of this thesis, given that my aim is to expressly address destitution using ESCRs as opposed to Civil and Political Rights.

Initially, however, the destitution theme of vulnerability was extrapolated from the concept, inherent within the traditional and civil-society definitions of destitution, of being

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<sup>277</sup> *ibid* 31–32.

<sup>278</sup> Luis F López-Calva and Eduardo Ortiz-Juarez, ‘A Vulnerability Approach to the Definition of the Middle Class’ (2014) 12 *J Econ Inequal* 23, 26.

<sup>279</sup> *ibid*.

<sup>280</sup> See chapter 1

<sup>281</sup> Bryan S Turner, *Vulnerability and Human Rights* (The Pennsylvania State University Press 2006) 20.

<sup>282</sup> *ibid*.

reliant upon non-legally guaranteed sources of rights realisation in order to realise the component rights and the insecurity which can result on this. In this second sense, an individual is vulnerable when the substance of their basic needs is attained but, however, this attainment is precarious in nature. Thus, in this second sense, the concept of vulnerability goes beyond the notion of an increased risk of harm to include the notion of an individual being at an increased risk of vulnerability as understood in the first sense. This links to, and is informed by, my discussion on the relationship between charitable provision of, human rights more generally,<sup>283</sup> and the substantive content of the component rights<sup>284</sup> elsewhere in this thesis.

### **2.4.3. *Indignity***

The destitution theme of indignity is strongly linked to and is broader than the destitution theme of vulnerability. The destitution theme of indignity was extrapolated from the concept, inherent within the traditional and civil-society definitions of destitution, of reliance upon charitable assistance to realise the physical substance of the component rights. The concept of dignity is especially pertinent to my human rights-based destitution definition. This is because ‘human dignity has been recognised as underlying the entire ambit of international human rights protection’<sup>285</sup> and is therefore central to human rights-based analyses and consequently any human rights-based understanding of destitution. More so, beyond the observation that a connection can be drawn between dignity and an adequate standard of living, Simpson observes that the context dependence of dignity ‘need not be fatal to its use in this context: the state’s socio-economic obligations to its citizens are acknowledged to depend on "the standards prevailing" in society, "maximum available resources", median income or the goods deemed

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<sup>283</sup> See section 2.2.

<sup>284</sup> See chapter 5.6. and chapter 6.3.

<sup>285</sup> Elizabeth Wicks, ‘The Meaning of “Life”: Dignity and the Right to Life in International Human Rights Treaties’ (2012) 12 Human Rights Law Review 199, 206.

necessary to a normal lifestyle.’<sup>286</sup> This point serves to illustrate how integrating dignity into the destitution definition can serve to ensure that the human rights-based definition I propose is capable of being applied in a context specific manner.

Dignity is an ambiguous and contested concept with there being no agreement as to its exact legal nature.<sup>287</sup> In pursuit of clarity and given the multitude of ways in which dignity may be understood, it is important to determine how dignity should be understood with respect to destitution. Simpson’s adoption of McCrudden’s perspective of dignity, specifically in relation to destitution, regards dignity as an

‘overarching concept protected by four "substantive areas" of human rights law: prohibition of inhuman treatment, assurance of individual autonomy, protection of group identity or culture and creation of the conditions for satisfaction of essential needs. The welfare state has an obvious role to play in upholding rights under all but the third of these headings.’<sup>288</sup>

This role of the welfare state is especially obvious given that ICESCR ‘very clearly ties social security to the protection of dignity’<sup>289</sup> and one interpretation of dignity, with respect to social security policy, requires ‘access to a minimum level of income or resources.’<sup>290</sup>

Neal argues that the *concept* of dignity ‘does not mean anything that cannot be expressed by reference to other values, particularly the principle of autonomy and the related idea of ‘respect for persons.’’<sup>291</sup> Dignity has also been argued to ‘act as a "bridge" between the

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<sup>286</sup> Simpson (n 89) 68.

<sup>287</sup> Rory O’Connell, ‘The Role of Dignity in Equality Law: Lessons from Canada and South Africa’ (2008) 6 International Journal of Constitutional Law 267, 268; see also Catherine Dupre, ‘Unlocking Human Dignity: Towards a Theory for the 21st Century’ [2009] E.H.R.L.R 190, 201–202.

<sup>288</sup> Simpson (n 89) 67.

<sup>289</sup> Simpson, McKeever and Gray (n 84) 18.

<sup>290</sup> *ibid* 17.

<sup>291</sup> Mary Neal, ‘Respect for Human Dignity as “Substantive Basic Norm”’ (2014) 10 International Journal of Law in Context 26, 27.



civil right to autonomy and the socio-economic right to satisfaction of essential needs’<sup>292</sup> This notion of satisfaction of essential needs shows the clear links between dignity and destitution.

Beyond the indignity which is inherent to the non-realisation of the physical substance of the component rights, the values of autonomy and respect for persons are, on account of the prominence they are given in Neal’s analysis, a natural starting point. This is especially so given that that these values align with my analysis of existing destitution definitions in section 2.2. above. A reliance on charitable assistance, for example, engages the concept of autonomy in a number of ways. For example, as will be discussed in greater detail later in this thesis, a reliance on charitable assistance: limits the personal choice and freedom of the individual; does not cater to the specific needs and preferences of the recipient; is inherently precarious; and carries with it the burden of social stigma.<sup>293</sup>

The concept of autonomy – or lack thereof – when engaged by a reliance on charitable assistance also engages the value of respect for persons. This is because, as demonstrated by the examples already highlighted in this paragraph, charitable assistance providers have no obligation to respect the autonomy of individuals. This point can be strengthened when it is considered that ‘although the House of Lords has made clear that charitable assistance can be an acceptable means of protection against inhuman or degrading living conditions, each of the three remaining elements [of McCrudden’s perspective] of dignity requires, or potentially requires, an income.’<sup>294</sup> Consequently, reliance on charitable assistance does not conform to McCrudden’s perspective of dignity, specifically assurance of individual autonomy, protection of group identity or culture, and creation of the conditions for satisfaction of essential needs.

Consequently, a reliance on charitable assistance is key to understandings of dignity

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<sup>292</sup> Simpson (n 89) 67.

<sup>293</sup> See chapter 6.3.

<sup>294</sup> Simpson, McKeever and Gray (n 84) 17.

with respect to destitution. This is especially so given that, when understood as an everyday concept,

‘there is a wealth of empirical evidence regarding what claimants consider it means to be treated with dignity, and in particular ways in which they feel the system fails to do so... Often, the threat to dignity flows less from the effects of poverty on physical health than from the demoralising experience of being forced to rely on family, friends or foodbanks for essentials and being unable to afford everyday social activities. This sense of shame does not spontaneously emerge within claimants but is linked to a “cultural economy of disgust” towards the poor, deliberately fostered by political and media narratives.’<sup>295</sup>

## 2.5. Concluding Remarks

If poverty can be defined, using a human rights framework, as the non-realisation of human rights. It follows that, if destitution is an extreme type of poverty, defining destitution using a human rights framework requires determining as to what level of realisation (*destitution threshold*) of which rights (*component rights*) constitutes extreme poverty. Thus, theoretically, and logically, any human rights-based definition of destitution must contain a number of core elements. These core elements are the rights which form a part of the definition, henceforth the *component rights*; and the level of rights realisation - of the component rights - below which destitution can be said to exist, henceforth the *destitution threshold*. At the most basic level, in considering these two theoretical core elements, destitution can be defined, from a human rights-based perspective, as *the non-realisation of the component rights to the destitution threshold*. Under this theoretical definition, an individual can be said to be destitute when their component rights are realised to a level below that of the destitution threshold.

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<sup>295</sup> *ibid* 20.

This chapter has examined existing definitions of destitution in order to identify common and recurring concepts and themes. Standards of living correlating to extreme poverty as categorised by reference to survival needs, vulnerability, and indignity were highlighted as themes inherent to the concept of destitution. These themes allowed the notion of basic needs to also be extrapolated as aligning with the destitution experience. The remaining chapters of Part One will apply these destitution themes to the identification of the component rights and the destitution threshold framework.

## Chapter 3: The Destitution Threshold

### 3.1. Introduction

The previous chapter identified the themes of survival needs, vulnerability, and indignity as being central to the experience of destitution. These themes may be split into two categories. The universal survival needs, which should not vary greatly from individual to individual or context to context, and the context-sensitive destitution themes of vulnerability and indignity which have the potential to vary greatly between contexts. The destitution threshold element of my human rights-based definition of destitution must therefore account for each of these themes.

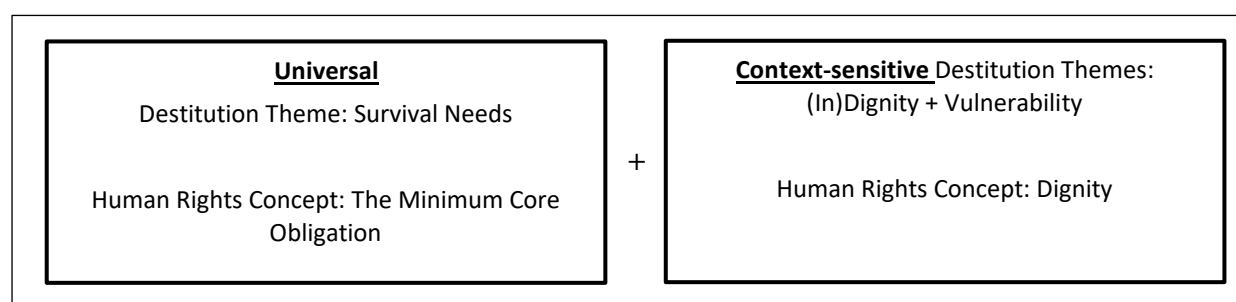
Plainly, a person is destitute under this definition if their component rights are not realised to a level which meets their survival needs in a dignified way free from vulnerability. This chapter will unpick this description of the destitution threshold. The interrelationship between the various component rights, that is to what extent is a person destitute if some but not all of their component rights are realised to the destitution threshold, will first be explored. Following this, the notion of a minimum entitlement will be explored. The view that individuals are minimally entitled to be free from destitution, is central to the analysis in this chapter. The destitution theme of survival will be examined and aligned with the notion of minimum core obligation.<sup>296</sup> It will be highlighted that the minimum core obligation is not in itself a suitable level at which to set the destitution threshold. This is in part due to its links to the universally perceived survival needs and links to the debate between using universal or context-sensitive measures of poverty (and consequently destitution) outlined in the preceding chapter. This chapter will reconcile these context-specific and universal approaches by determining that the

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<sup>296</sup> The minimum core obligation has also been referred to as the minimum obligation and the core obligation. However, for the purpose of consistency, this thesis will use the term minimum core obligation

minimum core obligation must be supplemented by a second standard of obligation which accounts for the varying contexts of states as well as the other destitution themes of vulnerability and indignity (see figure 3). As such a number of approaches to setting context specific standards of obligation will be explored. This analysis will allow a theoretical framework for determining the destitution threshold in a particular context to be enunciated.

**Figure 3: Translating the Destitution Themes into the Language of Human Rights**



### 3.2. The Interrelationship Between the Component Rights

Concerning the destitution threshold, a key conceptual issue is to determine the type of relationship which exists between the various component rights when making a determination as to whether an individual is destitute. This is because some of the component rights may be realised to the destitution threshold whilst, simultaneously, others are not. Therefore, more specifically, the purpose of this section is to establish how many of the component rights must remain unrealised to the destitution threshold in order for an individual to be deemed destitute under my definition.

Given the recognition of all human rights as being interdependent, indivisible and interrelated a failure in one sphere of human rights transcends into a potential human rights failure across all spheres.<sup>297</sup> One reason for this is that an individual may not be able to exercise,

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<sup>297</sup> Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, (I)(25); 'Proclamation of Tehran' (1968) U.N. Doc. A/CONF. 32/41 para 13; United Nations General Assembly UNGA, 'Declaration on the Right to Development' (United Nations 1986) A/RES/41/128 Art. 6.

for example, a civil or political right if a different category of right, such as an ESCR, has not been realised. This is affirmed by the interdependence approach which not only features in the preamble to the UDHR<sup>298</sup> but has also been affirmed by the state parties themselves in accepting that ‘all human rights and fundamental freedoms are indivisible and interdependent’<sup>299</sup> and this affirmation has been restated in a number of other U.N documents.<sup>300</sup> The term interdependent usually forms a package with the terms universal, indivisible and interrelated ‘or the separate words are used interchangeably’<sup>301</sup> and the United Nations ‘has boldly declared that the indivisibility, interdependency, and interrelatedness of human rights is ‘beyond dispute.’’<sup>302</sup> Therefore, in determining the relationship between the component rights these notions must be considered.

Rights are interdependent as, despite their distinctiveness as separate rights, the enjoyment of one right requires the enjoyment of others.<sup>303</sup> Specifically, in relation to the component rights, as the analysis above made clear,<sup>304</sup> their status as basic rights to basic needs rests inherently on the fact that their enjoyment is crucial to the enjoyment of other rights and this demonstrates that being interdependent is a defining feature of the component rights. Interrelatedness ‘means that they are brought into a situation of mutual relationship or connectedness’<sup>305</sup> and may apply more readily than interdependency in situations where the

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<sup>298</sup> Lanse Minkler, ‘Introduction: Why Economic and Social Human Rights’ in Lanse Minkler (ed), *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013) 1–18, 11.

<sup>299</sup> UNGA (n 297) Art. 6 (2).

<sup>300</sup> United Nations General Assembly UNGA, ‘Resolution on the Indivisibility and the Interdependence of Economic, Social, Cultural, Civil and Political Rights’, (United Nations 1989) U.N. Doc A/Res/44/130.

<sup>301</sup> Daniel J Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press 2010) 1.

<sup>302</sup> *ibid.*

<sup>303</sup> *ibid* 3.

<sup>304</sup> See chapter 2.4.1.

<sup>305</sup> Whelan (n 301) 4.

enjoyment of one right does not expressly depend upon the enjoyment of another.<sup>306</sup> Alternatively, indivisibility suggests that rights must be considered as a whole with the alternative being that they are divided or separated.<sup>307</sup> These observations suggest that the component rights should be considered holistically in determining destitution.

This contention can be supported further using the example of the interrelationship between the right to health and the right to water. Cahill-Ripley demonstrates how, despite the fact that realisation of the right to water partly contributes to the realisation of the right to health, an individual's right to water can be fully realised whilst at the same time their right to health is being violated.<sup>308</sup> Therefore, despite the interrelationship between the rights, violations of one right can occur independently of violations of the other and this consequently requires that, despite being integral to the realisation of the right to health under ICESCR Article 12, 'the right to water must constitute an independent right under article 11.'<sup>309</sup> This reasoning can be extrapolated from the specific example of the interrelationship between the right to water and the right to health and applied to the component rights of my destitution definition. It follows that, the realisation of one component right may depend partly upon the realisation of another. Even though that is the case, this should not undermine one right at the expense of another. Instead, a holistic approach should be taken.

In the previous chapter standards of living were highlighted as a key theme in the understanding of destitution. Hohmann contends that adequacy, in regard to the right to an adequate standard of living as enshrined in Article 25 of the UDHR, must 'be read in light of

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<sup>306</sup> *ibid.*

<sup>307</sup> *ibid* 6.

<sup>308</sup> Amanda Cahill-Ripley, *The Human Right to Water and Its Application in the Occupied Palestinian Territories* (Routledge 2011) 39.

<sup>309</sup> *ibid.*

provision's purpose, which is the health and well-being of the individual and the family.'<sup>310</sup> This purpose, and the notion of a holistic approach to an adequate standard of living, link the component rights, which will be informed by living standards, together. This can be supported by Cahill-Ripley's contention that the relationship between the rights guaranteed under the right to an adequate standard of living can be 'easily established'<sup>311</sup> with all these rights being 'constitutive elements of the more general right to an adequate standard of living.'<sup>312</sup> An example of this is the consideration of access to utilities, and other 'certain facilities essential for health, security, comfort and nutrition,'<sup>313</sup> in determining the adequacy of housing. Kanga contends that this view has been supported by the European Committee on Social Rights in holding that "adequate housing" entails 'all basic amenities, such as water, heating, waste disposal; sanitation facilities; electricity etc.'<sup>314</sup> In applying this to the component rights the implications of this are that determining adequacy in relation to one component right may entail considering the substance of other component rights.

In sum, the component rights will be identified in the following chapter by reference to the destitution themes of survival needs, vulnerability, and indignity. Given that the component rights are basic rights justified by the fact that they meet basic needs, and due to the interdependent nature of these rights, it is contended that an individual is destitute if one, or any combination, of their component rights are not realised to the destitution threshold. This understanding of the interrelatedness of the component rights in defining destitution is important to ensuring that my human rights-based definition of destitution is practically

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<sup>310</sup> Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart Publishing 2013) 16.

<sup>311</sup> Cahill-Ripley (n 308) 34.

<sup>312</sup> *ibid* 24.

<sup>313</sup> Serges Djoyou Kanga, 'The Right to Basic Sanitation: A Human Right in Need of Constitutional Guarantee in Africa' (2013) 29 *South African Journal on Human Rights* 615, 619.

<sup>314</sup> *ibid* 637.



applicable. Whilst being the correct position with regard to human rights theory, the interrelationship between the component rights as so understood provides a greater degree of clarity and certainty than alternative understandings of this interrelationship. This is because any alternative understanding of this interrelationship would allow scope for debate as to the destitution status of individuals. For example, it could perhaps be argued that because an individual has access to the substance of some of the component rights, they are not destitute as compared to an individual without ready access to this. Whilst running counter to the analysis within this section and I contend, as such, human rights principles, such alternative understandings of the interrelationship between the component rights would undermine the application of my human rights-based destitution definition. Having clarified the status of this interrelationship, the remainder of this chapter will determine the level of rights realisation below which an individual is destitute: my destitution threshold.

### **3.3. The Destitution Threshold Level**

With the purpose of informing my definition of the destitution threshold level, this section will explore a number of approaches to determine the minimum obligation in regard to the realisation of ESCRs. The approaches that will be explored are the minimum core obligation, reasonableness, and benchmarks and indicators. The primary focus will be the minimum core obligation. This is because the debate around its nature as being either a universal or instead a contextually relative standard will act as a catalyst for informing the design of my destitution definition.

Although these approaches to determining states' obligations are dissimilar, their purpose is shared. The approaches seek to balance the claims of the individual against the resources of the state. In this sense, these approaches are a means to determine the extent of the duties and obligations of states. This is required given the existence of the concepts of *progressive realisation* and *maximum available resources*. These two concepts are contained

within Article 2(1) of the ICESCR as a concession to the realities of the inability to afford to fully realise ICESCR rights faced by some States.<sup>315</sup> However, concerns existed that these concepts could be used by States to take little action towards achieving full realisation and allow states to defend their failure to dispense of their obligations by using concepts enshrined within the covenant.<sup>316</sup>

### ***3.3.1. The Universal Aspect of the Destitution Threshold: Survival Needs***

#### ***3.3.1.1. The Minimum Core Obligation***

The existing, and well established, obligation under human rights law which at first glance would appear to most readily align with the concept of basic needs is that of the minimum core obligation. The minimum core obligation is intimately linked to the destitution theme of survival needs given that, for Bilchitz, this obligation constitutes a subsistence level.<sup>317</sup> This concept was by no means included as a provision in the ICESCR and instead ‘derives from General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights.’<sup>318</sup> More so this General Comment was drafted and adopted several decades after the ICESCR. The CESCR has, however, read the concept of the minimum core obligation into Article 2(1) of the ICESCR.<sup>319</sup> The CESCR’s rationale, which has been alluded to in section

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<sup>315</sup> Committee on Economic and Social Rights CESCR, ‘General Comment No.3: The Nature of States Parties’ Obligations’ (United Nations 1990) U.N. Doc. E/1991/23 para 9; see also Phillip Alston and Ryan Goodman, *International Human Rights* (OUP 2013) 316.

<sup>316</sup> David Bilchitz, ‘Towards A Reasonable Approach to The Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence’ (2003) 19 *South African Journal on Human Rights* 1, 1.

<sup>317</sup> David Bilchitz, ‘Socio-Economic Rights, Economic Crisis, and Legal Doctrine’ (2014) 14 *International Journal of Constitutional Law* 710, 719; see also David Bilchitz, ‘Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance’ (2002) 119 *The South African Law Journal* 484, 488.

<sup>318</sup> Bilchitz, ‘Socio-Economic Rights, Economic Crisis, and Legal Doctrine’ (n 317) 729.

<sup>319</sup> Bilchitz, ‘Towards A Reasonable Approach to The Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence’ (n 316) 12; see also Lillian Chenwi, ‘Unpacking “Progressive Realisation”, Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance’ (2013) 46 *De Jure* 742, 754.

3.3., was to respond to the problems arising from Article 2(1) ICESCR<sup>320</sup> and as such prevent the ICESCR rights from being deprived of meaning.<sup>321</sup>

The minimum core obligation is an obligation of every state party to realise, ‘as a matter of priority,’<sup>322</sup> the ‘minimum essential levels of each of the rights’<sup>323</sup> enshrined in the ICESCR. The minimum core obligation can be regarded as ‘a right to basic socio-economic entitlements that can be claimed by everyone in desperate need.’<sup>324</sup> It aims to provide a minimum level of social protection for all.<sup>325</sup> It is therefore clear that the concept can be linked to standards of living correlating to survival and subsistence. It therefore links heavily to the notion of human dignity<sup>326</sup> and, as the essence of any right,<sup>327</sup> is the level that must be reached in order to prevent the right losing its ‘substantive value’<sup>328</sup> and purpose.<sup>329</sup>

Given that the minimum core obligation is not subject to either ‘maximum available

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<sup>320</sup> Lisa Forman et al., ‘What Could a Strengthened Right to Health Bring to the Post-2015 Health Development Agenda?: Interrogating the Role of the Minimum Core Concept in Advancing Essential Global Health Needs’ [2013] BMC International Health and Human Rights <<http://www.biomedcentral.com/1472-698X/13/48> on 23/12/16> accessed 19 September 2019; Lisa Forman, ‘Can Minimum Core Obligations Survive a Reasonableness Standard of Review Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?’ (2015) 47 Ottawa Law Review 561, 564.

<sup>321</sup> Leijten (n 44) 35.

<sup>322</sup> CESCR, ‘General Comment No.3: The Nature of States Parties’ Obligations’ (n 315) para 10.

<sup>323</sup> Robert E Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights’ (1994) 16 Human Rights Quarterly 692, 701 quoting CESCR U.N. Doc. No. E/C.12/1990/8 (1990).

<sup>324</sup> Oliver Fuo and Anel Du Plessis, ‘In the Face of Judicial Deference: Taking the “Minimum Core” of Socio-Economic Rights to the Local Government Sphere’ (2015) 19 Law, Democracy & Development 1, 5.

<sup>325</sup> Leijten (n 44) 36; see also Erik B Bluemel, ‘The Implications of Formulating a Human Right to Water’ (2004) 31 Ecology Law Quarterly 957, 976.

<sup>326</sup> Lutz Oette, ‘Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?’ (2015) 15 Human Rights Law Review 669, 687.

<sup>327</sup> Lorette Arendse, ‘The Obligation to Provide Free Basic Education In South Africa: An International Law Perspective’ (2011) 14 Potchefstroom Electronic Law Journal 96, 109.

<sup>328</sup> Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 366.

<sup>329</sup> CESCR, ‘General Comment No.3: The Nature of States Parties’ Obligations’ (n 315) para 10; see also Marco Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law Process and Practice* (Routledge 2013) 21.

resources’ or ‘progressive realisation’<sup>330</sup> it creates immediate obligations as opposed to obligations to be progressively realised.<sup>331</sup> Furthermore, in order to rely on the defence of an inability to realise the minimum core obligation as a result of lack of available resources the State must demonstrate that it has made every effort to prioritise its resources in order to fulfil this obligation.<sup>332</sup> This is to be seen as an initial step towards full realisation. This step is achieved through reframing the obligation from one of aspiration to one of concrete and objective targets<sup>333</sup> and better protects right holders ‘by closing the loophole of ‘progressive realization.’<sup>334</sup>

For these reasons, despite the fact that the concept can be regarded as contested and complex,<sup>335</sup> the minimum core obligation is regarded as a ‘non-derogable foundation’<sup>336</sup> which must be guaranteed for all.<sup>337</sup> More so, it is a baseline below which the realisation of ICESCR rights should not fall.<sup>338</sup> This ‘irreducible’<sup>339</sup> core should be realised without delay,<sup>340</sup> and given immediate effect,<sup>341</sup> by all State Parties to the ICESCR.<sup>342</sup> Failure to achieve the realisation of

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<sup>330</sup> Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) 66.

<sup>331</sup> Sepulveda (n 328) 175.

<sup>332</sup> CESCR, ‘General Comment No.3: The Nature of States Parties’ Obligations’ (n 315) para 10.

<sup>333</sup> Chenwi (n 319) 754.

<sup>334</sup> George S McGraw, ‘Defining and Defending the Right To Water And Its Minimum Core: Legal Construction And the Role Of National Jurisprudence’ (2010) 8 *Loyola University Chicago International Law Review* 127, 203.

<sup>335</sup> Aoife Nolan, ‘Budget Analysis and Economic and Social Rights’ in Eibe Riedel et al (ed), *Economic, Social, and Cultural Rights in International Law* (OUP 2014) 369–391, 374.

<sup>336</sup> Odello and Seatzu (n 329) 65.

<sup>337</sup> Rhonda Copelon, ‘The Indivisible Framework of International Human Rights: A Source of Social Justice In The U.S.’ (1998) 3 *New York City Law Review* 59, 64.

<sup>338</sup> Odello and Seatzu (n 329) 67; see also McGraw (n 334) 154.

<sup>339</sup> Forman et al. (n 320) 2.

<sup>340</sup> Bilchitz, ‘Towards A Reasonable Approach to The Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence’ (n 316) 11.

<sup>341</sup> Javaid Rehman, *International Human Rights Law* (Second Edition, Pearson Education Limited 2010) 144.

<sup>342</sup> Jonathon Berger, ‘Foreword’ in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice* (CUP 2008) vii–xiv, xii.

the minimum core obligation constitutes a prima facie breach of the State's obligations<sup>343</sup> in that it is a violation of the 'corresponding core rights.'<sup>344</sup> Therefore, the minimum core obligation can be defined as an immediate obligation to realise the levels of the enumerated rights required for human survival. Therefore, unless a state can show it has taken 'every effort to realise the right'<sup>345</sup> to the minimum core then it has breached its obligations.

On account of this, it is clear that the minimum core obligation strongly correlates with the destitution theme of survival needs. However, the minimum core obligation is not appropriate as the sole determinant of a destitution threshold which aims to be universally applicable. This is because it is less clear how the minimum core obligation correlates to the remaining destitution themes of vulnerability and indignity.

Although the General Comments of the CESCR have provided some guidance as to the minimum core obligations of specific rights it is clear that some difficulty in determining the extent of the minimum core obligation still exists<sup>346</sup> with the CESCR having met with little success in this regard.<sup>347</sup> Additionally, the CESCR has shifted its focus from minimum core obligations towards core obligations and in its work has specified and clarified the core obligations relating to many specific ESCRs.<sup>348</sup> This shift is indicative of a separation of the minimum entitlement from the core obligation. This separation may be explained by concerns that a minimum core obligation approach acts as an inducement for States to 'limit their efforts

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<sup>343</sup> Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (n 317) 729.

<sup>344</sup> Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights Law Review 557, 581.

<sup>345</sup> Bluemel (n 325) 976.

<sup>346</sup> Sandra Liebenberg, *Socio-Economic Rights. Adjudication under a Transformative Constitution* (Juta 2010) 150.

<sup>347</sup> Sepulveda (n 328) 367.

<sup>348</sup> Lisa Forman et al., 'Conceptualising Minimum Core Obligations under the Right to Health: How Should We Define and Implement the 'morality of the Depths'' (2016) 20 The International Journal of Human Rights 531, 536. The CESCR's clarification of the core of the component rights will be explored in chapter 4.3

to the lower level of accomplishment, to avoid international censorship.’<sup>349</sup> This should not be the case theoretically, and the minimum core obligation is envisioned to act as a springboard to the full and progressive realisation of all ICESCR rights,<sup>350</sup> however the notion of prioritisation does undermine this. This is because the minimum core obligation approach, in prioritising the core of the right, ‘does not protect the individual against the collective’<sup>351</sup> as there is a risk that focusing on the minimum core obligation can cause states to prioritise those who are below this level of realisation. Such prioritisation is supported by the Limburg principles.<sup>352</sup> These principles were adopted following consideration of the nature and scope of States parties’ obligations under the ICESCR. Additionally, the CESCR’s General Comment No. 3, on the nature of States Parties’ obligations, also contains this concept of prioritisation with regard to ‘minimum obligations.’<sup>353</sup>

However, it can be argued that reducing rights to a minimum core obligation threatens, and is counterproductive to,<sup>354</sup> the broader long-term goals of the rights in question.<sup>355</sup> This is because the State will perpetually bring new groups and individuals to the threshold required by the minimum core obligation, in order to avoid failing to realise its immediate obligations, only to leave them at that level of provision in order to uplift others. Furthermore, in relation to the right to health specifically, this prioritisation of the core results in the non-core aspects

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<sup>349</sup> Odello and Seatzu (n 329) 20.

<sup>350</sup> Ssenyonjo (n 330) 67.

<sup>351</sup> Karin Lehmann, ‘In Defense Of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core’ (2006) 22 *American University International Law Review* 163, 191.

<sup>352</sup> UN Commission on Human Rights, ‘Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (1987) para 14. These principles were adopted by a group of experts and as such have a non-legally binding nature. However, aspects of these principles have been incorporated into the CESCR’s General Comment No. 3.

<sup>353</sup> CESCR, ‘General Comment No.3: The Nature of States Parties’ Obligations’ (n 315) para 10.

<sup>354</sup> Liebenberg (n 346) 172.

<sup>355</sup> Katharine G Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale Journal of International Law* 113, 114.

of any right to be deprioritised.<sup>356</sup> This point regarding the impact of prioritisation can be extrapolated, from the example of the right to health, to be equally applicable to all ICESCR rights. This does not adhere to the way in which the minimum core obligation was envisioned to work. Even so, the focus is not on all rights of all individuals but instead the plight of those facing the most severe cases of rights deprivation<sup>357</sup> and this results in what has been termed ‘emergency type measures.’<sup>358</sup> These measures are therefore reactive in nature and may not address the underlying issues and institutions which led to the non-realisation of rights in the first place.<sup>359</sup> This point is in essence that in practice the minimum core obligation can become a ‘ceiling rather than a floor.’<sup>360</sup>

Another key debate surrounding the minimum core obligation approach is as to whether the level of realisation required to satisfy this obligation is universal or relative. Bantekas and Oette, amongst others,<sup>361</sup> have asked the question as to whether, pertaining to the minimum core obligation, different standards exist between developed and developing countries.<sup>362</sup> This is of pertinence to the consideration of the concept of the minimum core obligation as a tool by which to determine the first universal aspect of the destitution threshold. More so, this question must also be answered in relation to the destitution threshold itself.

There are two possible outcomes in this regard. Either the nature of the obligations under the concept of minimum core obligation are of universal applicability, and thereby hold all states to the same standards, or else the minimum core obligation is of a context-specific

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<sup>356</sup> Forman et al. (n 348) 536.

<sup>357</sup> Young (n 355) 114.

<sup>358</sup> Liebenberg (n 346) 172.

<sup>359</sup> Young (n 355) 174.

<sup>360</sup> Forman et al. (n 320) 7.

<sup>361</sup> Ssenyonjo (n 330) 66.

<sup>362</sup> Illias Bantekas and Lutz Oette, *International Human Rights: Law and Practice* (Second Edition, CUP 2016) 413.

nature thereby holding states to different standards of obligations. This debate is framed around the contention that, as the minimum core obligation is set at a level which is meant to be attainable for developing nations,<sup>363</sup> developed nations should be able to attain a higher level of realisation than the level envisioned in the minimum core obligation. It has not always been clear as to which of these two approaches is the correct one.<sup>364</sup>

The minimum core obligation threshold is determined by that which is needed to survive or subsist. This approach effectively excludes those in developed nations where it is generally assumed that people live above such a threshold. Young argues that ‘additional principles over simple survival’<sup>365</sup> are required in this field and in order to make the minimum core obligation more appropriate in more developed nations perhaps some additional principles, which give the concept some relativity, are required.

In contrast to this, Ssenyonjo argues that allowing state specificity undermines the purpose of the minimum core obligation and that, therefore, the minimum core obligation is ‘an absolute international minimum.’<sup>366</sup> Only by adopting this universal approach can the minimum core obligation be meaningful.<sup>367</sup> The Maastricht Guidelines, suggest that the minimum core obligation applies ‘irrespective of the availability of resources of the country concerned or any other factors and difficulties.’<sup>368</sup> This is because it can be inferred from this statement that the minimum core obligation applies in all circumstances. Such a view can be readily supported in assessing the aims of the CESCRC in developing the concept of minimum

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<sup>363</sup> Charles Ngwenya and Rebecca Cook, ‘Rights Concerning Health’ in Danie Brand and Christof Heyns (eds), *Socio-Economic Rights in South Africa* (Pretoria University Law Press 2005) 107–153, 117–118.

<sup>364</sup> Lehmann (n 351) 183.

<sup>365</sup> Young (n 355) 131.

<sup>366</sup> Ssenyonjo (n 330) 66.

<sup>367</sup> Lehmann (n 351) 184.

<sup>368</sup> Maastricht Guidelines, ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26 1997’ para 9.



core obligation. General Comments No.3<sup>369</sup> and No.14<sup>370</sup> of the CESCR have been described as suggesting that the minimum core obligation is one of a universal nature<sup>371</sup> and the CESCR's purpose was to 'define a minimum floor.'<sup>372</sup> This 'minimum floor' applies not only to those in developing countries but also 'to the disadvantaged in developed states.'<sup>373</sup> In this sense, in developed nations the minimum core obligation should act as a device of determining priority with the first priority being ensuring that the minimum core obligation is realised for all by ensuring that 'all individuals are above the absolute minimum.'<sup>374</sup>

This approach 'theoretically'<sup>375</sup> holds all states to the same standards. However, it can be contended that the universal approach does not transcend beyond this theoretical nature. One reason for this is that defining such concrete minimum obligations, which apply equally across all State Parties, fails to take account of contextual relativism.<sup>376</sup> In this sense, given the differences between individuals across States, universality in relation to minimum core obligation may be an 'impossible goal.'<sup>377</sup> Sen highlights how the baseline of goods required for societal participation varies between societies and States<sup>378</sup> and in relation to destitution this suggests that the use of the minimum core as a tool by which to determine the first element of the destitution threshold may be inappropriate.

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<sup>369</sup>CESCR, 'General Comment No.3: The Nature of States Parties' Obligations' (n 315).

<sup>370</sup> Committee on Economic and Social Rights CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2000) UN.Doc. E/C.12/2000/4'.

<sup>371</sup> Lehmann (n 351) 183.

<sup>372</sup> Pierre de Vos, 'The Right to Housing' in Danie Brand and Christof Heyns (eds), *Socio-Economic Rights in South Africa* (Pretoria University Law Press 2005) 85–106.

<sup>373</sup> Odello and Seatzu (n 329) 67.

<sup>374</sup> Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (n 317) 732.

<sup>375</sup> McGraw (n 334) 156.

<sup>376</sup> Young (n 355) 137.

<sup>377</sup> *ibid* 116.

<sup>378</sup> *ibid* 137 quoting Sen.

In supporting the view that the minimum core obligation is of a context-specific nature the South African Constitutional Court has held that the minimum core obligation can be established in country specific contexts<sup>379</sup> given the diversity of needs which can exist<sup>380</sup> and which ‘may vary according to a wide range of factors.’<sup>381</sup> These factors demonstrate the difficulty in establishing one minimum core. This difficulty undermines the contention that the nature of the minimum core obligation is universal.<sup>382</sup> It is perhaps because of this that a universal determination of the minimum core obligation has been described as hardly seeming possible.<sup>383</sup>

Much of the literature has addressed how the preferred nature of the minimum core obligation as being of a universal standard can, in some instances, impose a standard upon developing States which is unattainable and consequently unrealistic.<sup>384</sup> This debate is not the focus of this piece, it is mentioned merely to highlight the criticism that the concept of minimum core obligation causes us to focus ‘only to the performance of developing states’<sup>385</sup> at the expense of those living ‘without’ in more developed States. Instead, the implications of the perceived nature of the minimum core obligation as being of a standard which is attainable in the poorest, as well as the richest, States will be explored in relation to the effects of setting such a low, attainable standard upon those living in developed States. This is because this notion creates a number of issues which may detrimentally affect the realisation of ESCRs for those living in more developed States.

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<sup>379</sup> Arendse (n 327) 169.

<sup>380</sup> Mesenbet Assefa Tadege, ‘Defining the Minimum Core Obligations-Conundrums in International Human Rights Law and Lessons from the Constitutional Court of South Africa’ (2010) 1 Mekelle University Law Journal 48, 60.

<sup>381</sup> Fuo and Du Plessis (n 324) 8.

<sup>382</sup> Bilchitz, ‘Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance’ (n 317) 487.

<sup>383</sup> Leijten (n 44) 38.

<sup>384</sup> *ibid.*

<sup>385</sup> Young (n 355) 114.

Primarily, and simply, some argue that the minimum core obligation, in being attainable for developing States, is set at a level below which allows for a dignified existence in developed States.<sup>386</sup> This is as a result of the universal nature of the standard which does not account for the varying needs of different groups.<sup>387</sup> In this sense, by setting a lower standard of realisation the minimum core obligation approach limits rights.<sup>388</sup> This is because the ‘optimal realisation’<sup>389</sup> of the rights goes far beyond the minimum. This argument is based upon the contention that, given that only the minimum core obligation is immediate in nature and can constitute a violation if not realised, States prioritise<sup>390</sup> the realisation of the minimum core to the detriment of those who, despite being above this threshold, are not living in a dignified state of existence.

On top of this, the minimum core obligation approach does nothing to help those who, despite being above the minimum core obligation threshold, ‘suffer severe losses to their economic security and well-being.’<sup>391</sup> It is clear that in wealthy, highly-industrialised States there is no reason not to approach full realisation.<sup>392</sup> If beyond the minimum core obligation, within the boundaries of the concept of maximum available resources, a developed state could afford to fully realise the ICESCR rights for all within its territory some would argue that ‘the minimum and the maximum would be one and the same.’<sup>393</sup>

Ultimately, a universal minimum core may not be appropriate in some contexts. The

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<sup>386</sup> Bilchitz, ‘Socio-Economic Rights, Economic Crisis, and Legal Doctrine’ (n 317) 732.

<sup>387</sup> Liebenberg (n 346) 149.

<sup>388</sup> Ssenyonjo (n 330) 68.

<sup>389</sup> Asbjorn Eide, ‘Economic and Social Rights’ in Janusz Symonides (ed), *Human Rights: Concepts and Standards* (Ashgate 2000) 109–174, 123.

<sup>390</sup> Arendse (n 327) 110.

<sup>391</sup> Bilchitz, ‘Socio-Economic Rights, Economic Crisis, and Legal Doctrine’ (n 317) 732.

<sup>392</sup> Copelon (n 337) 64–65.

<sup>393</sup> Lehmann (n 351) 185.

same is also true of a destitution threshold which was only universal in nature. That is because, in being designed to be feasibly achievable by developing States a universally applicable standard may be set too low a standard for more developed nations. As a result of this, using it as a tool in determining the destitution threshold may exclude from my rights-based definition of destitution those individuals who, despite experiencing what can agreeably be regarded as destitution, have their rights realised to a level above that of the minimum core obligation. Despite this, I support the universal nature of the minimum core obligation and believes that an alternative middle ground can be reached between universal and relative approaches to minimum standards of obligations when informing the destitution threshold. In the following sections the potential for such a reconciliation, through an approach which sets universal as well as context-sensitive standards, will be explored.

### ***3.3.2. The Context-sensitive Aspect of the Destitution Threshold: Vulnerability and Indignity***

The previous section has established that the universal minimum core obligation, which exists for each component right, aligns with the destitution theme of survival needs. However, it was also made clear that the minimum core obligation is not an appropriate determinant of the destitution threshold in all contexts. Despite this, given the strong links evidenced between the destitution theme of survival needs and the minimum core obligation, the destitution threshold may never be set at a level below that of the minimum core obligation. It is therefore clear that, within the destitution threshold, the minimum core obligation must be supplemented so that the destitution themes of vulnerability and indignity are also central to determining this threshold. The minimum core obligation may be regarded as a universal level of minimum obligation and the minimum level of protection from indignity and vulnerability - within the universal aspect of my destitution threshold - requires that the minimum core obligation is realised without reliance on charitable assistance.

However, beyond this minimum level, dignity and vulnerability will have different

meaning in different contexts. Consequently, other approaches to determining minimum levels of obligation exist which are set a context-sensitive level dependent upon the context must be explored. This section will explore two existing alternatives to determining the standards of state obligation with regard to ESCRs realisation: reasonableness and the use of indicators alongside benchmarks. Through exploring these context-sensitive approaches, this section will inform my understanding of the context-sensitive element of the destitution threshold and thus contribute to determining ESCRs obligations which allow for context-sensitive standards to be determined by reference to both vulnerability and indignity.

### 3.3.2.1. The Reasonableness Approach

The concept of reasonableness is one context-sensitive approach to determining the minimum obligations, and consequently rights entitlements, with regard to ESCRs. In relation to the assessment of ESCR provision, reasonableness is perhaps most widely associated with South Africa.<sup>394</sup> This is because the South African Constitutional Court (SACC) rejected the ‘notion of minimum core obligations’<sup>395</sup> in a number of cases concerning the ESCRs enshrined in the constitution.<sup>396</sup> Given that South Africa did not ratify the ICESCR until 2015<sup>397</sup> at the time that this standard was initialised the SACC was under no obligation to implement the minimum core obligation approach.

This concept, to put it plainly, considers both the rationality and proportionality of an administrative action through the method of a substantive assessment.<sup>398</sup> Along this vein this

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<sup>394</sup> Audrey Chapman and Sage Russell, ‘Introduction’ in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 1-19,18.

<sup>395</sup> Tadeo (n 380) 70.

<sup>396</sup> Leijten (n 44) 39.

<sup>397</sup> Office of the High Commissioner for Human Rights OHCHR, ‘Status of Ratification Interactive Dashboard’ <<http://indicators.ohchr.org/>> accessed 20 September 2019.

<sup>398</sup> Carol Steinberg, ‘Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-Economic Rights Jurisprudence’ (2006) 123 *The South African Law Journal* 264, 278.

approach is less concrete than the minimum core obligation approach<sup>399</sup> and because of this perhaps offers more flexibility to States. In 2005 Ngwena and Cook suggested that this approach was at variance with the CDESCR's approach.<sup>400</sup> Further, Berger has suggested that the minimum core obligation assessment was not free-standing but was instead a part of the reasonableness assessment.<sup>401</sup> However, in Article 8(4) of the 2008 Optional Protocol to the ICDESCR (OP-ICDESCR) the reasonableness standard of review is endorsed for when the CDESCR is adjudicating decisions.<sup>402</sup> As can be inferred from this, the reasonableness approach does maintain some aspects of the minimum core obligation albeit as a part of the substantive assessment.<sup>403</sup>

Integrating the minimum core obligation into the reasonableness standard would follow the lead of the SACC. This could be seen by some as a merging of the reasonableness and minimum core obligation approaches to create a 'reasonable minimum core'.<sup>404</sup> The reasonableness approach, therefore, has great potential in more developed nations to address the criticisms that I have levied against the minimum core obligation in this context. In having the potential to raise the minimum standard to a level above that which is embedded in the minimum core obligation, the reasonableness approach alleviates the problem of those in developed States who, despite being above the minimum core obligation threshold, are below the threshold required to live a dignified life in that State's society. Thus, this may well be a more suitable approach for developed States and may well explain as to why, as Heller

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<sup>399</sup> Jonathon Berger, 'Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice* (CUP 2008) 68.

<sup>400</sup> Ngwena and Cook (n 363) 144.

<sup>401</sup> Berger (n 399) 75–76.

<sup>402</sup> Committee on Economic and Social Rights CDESCR, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, A/RES/63/117'.

<sup>403</sup> Chenwi (n 319) 757.

<sup>404</sup> Jernej Letnar Cernic, 'The European Court of Human Rights, Rule of Law and Socio-Economic Rights in Times of Crises' (2016) 8 *Hague on the Journal Rule of Law* 227, 228.

highlights, that the CESCR relies ‘on the standard of reasonableness and has developed criteria to assess whether the measures taken by States are reasonable’.<sup>405</sup>

The reasonableness approach can perhaps best be distinguished from the minimum core obligation approach in that, despite having a similar function in prioritising the most in need, it ‘breaks definitively from the idea of core obligations as non-derogable parts of the right.’<sup>406</sup> For those who support the universal nature of the minimum core obligation, as highlighted above, this may be troubling in that by doing away with the notion of the core of the right being non-derogable<sup>407</sup> those individuals in States where it is deemed unreasonable to expect this core survival threshold to be met may be adversely affected. Thus, the reasonableness standard may not be appropriate in developing States. Therefore, for some critics the reasonableness approach may not do enough to protect rights.<sup>408</sup>

Even so, for some this failure of the reasonableness approach to set a non-derogable minimum floor has positive implications. This is because, rather than determining a rule, reasonableness can allow for progressive interpretations depending on the circumstances in the relevant State. Thus, it is ‘likely to realize lasting social reform’<sup>409</sup> as the standard to which the State is held can progress along with its increasing development. On top of this, in focusing on ensuring fair processes as opposed to merely the outcomes to be achieved, unlike the minimum core obligation approach, this is perhaps more likely to ‘produce fair policies.’<sup>410</sup>

This is as opposed to the minimum core obligation approach which, as has been touched

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<sup>405</sup> Léo Heller, ‘Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation’ (2015) UN.Doc. A/70/203’ para 79.

<sup>406</sup> Forman (n 320) 570.

<sup>407</sup> The non-derogable nature of the minimum core obligation was addressed above. See (n 330-345). Rendering this non-derogation nugatory would undermine the minimum core as a minimum level of realisation.

<sup>408</sup> Liebenberg (n 346) 163–164.

<sup>409</sup> Steinberg (n 398) 265.

<sup>410</sup> Forman (n 320) 572.

upon in the previous sections, would hold the State to the same minimum standards regardless of its development. The implication of such an approach would be that the minimum required to dispel the obligation would be determined not according to a universal minimum standard but instead by what is reasonable in that State.

### 3.3.2.2. Benchmarks and Indicators

Another means of setting context specific standards of obligation is through the use of benchmarks based on indicators. The terms benchmarks and indicators have been used synonymously.<sup>411</sup> This is not surprising given that ‘for a number of experts and activists writing on economic, social and cultural rights, indicators appear to play a role as a sort of way station on the road to benchmarks.’<sup>412</sup> However, benchmarks and indicators are ‘distinct terms’<sup>413</sup> in the field of human rights.

Benchmarks are a means of measuring performance.<sup>414</sup> They are contextually defined national targets<sup>415</sup> for state achievement which represent both human rights treaty standards and, consequently, the international law applicable to - and obligations of – a state.<sup>416</sup> In being defined by ‘specific human rights standards,’<sup>417</sup> benchmarks therefore ‘set specific obligations

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<sup>411</sup> Anna Würth and Frauke Lisa Seidensticker, ‘Indices, Benchmarks, and Indicators: Planning and Evaluating Human Rights Dialogues’ (Studie / Deutsches Institut für Menschenrechte 2005) 22 <[https://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/Publikationen/Studie/study\\_indices\\_benchmarks\\_and\\_indicators.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Studie/study_indices_benchmarks_and_indicators.pdf)> accessed 20 September 2019.

<sup>412</sup> Maria Green, ‘What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement’ (2001) 23 Human Rights Quarterly 1062, 1080.

<sup>413</sup> *ibid.*

<sup>414</sup> Würth and Seidensticker (n 411) 29.

<sup>415</sup> Paul Hunt and Gillian MacNaughton, ‘A Human Rights-Based Approach to Health Indicators’ in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP 2007) 303–330, 308.

<sup>416</sup> Gauthier de Beco, ‘Human Rights Indicators for Assessing State Compliance with International Human Rights’ (2008) 77 Nordic Journal of International Law 23, 47.

<sup>417</sup> Helen Watchirs, ‘Review of Methodologies Measuring Human Rights Implementation’ 30 The Journal of Law, Medicine & Ethics 716, 718.



that states must achieve over a period of time with respect to the relevant indicators.’<sup>418</sup> This role of benchmarks as ‘tailored targets’<sup>419</sup> has been described as an attempt, by the monitoring committee, to ‘take relative resources into account when assessing state performance.’<sup>420</sup>

No definition of indicators, on the other hand, is yet settled in human rights law.<sup>421</sup> Despite being regarded by some as quantitative<sup>422</sup> and ‘essentially statistical in nature,’<sup>423</sup> the term has been used within human rights to go beyond statistics alone.<sup>424</sup> Thus indicators are any information relevant to measuring the extent of realisation of a human right.<sup>425</sup> Human rights indicators measure human rights realisation ‘in absolute terms’<sup>426</sup> and can therefore be used to evaluate whether benchmarks have been met.<sup>427</sup> They therefore ‘provide a methodology for monitoring progressive realization’<sup>428</sup> through measuring the ‘enjoyment of rights by rights holders.’<sup>429</sup> In sum, whereas the benchmark is the target, the indicator is the means through which the target is set and the means of measuring realisation.

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<sup>418</sup> Sital Kalantry et al., ‘Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR’ (2010) 32 Human Rights Quarterly 253, 291.

<sup>419</sup> Watchirs (n 417) 718.

<sup>420</sup> Jody Heymann et al., ‘Rights Monitoring and Assessment Using Quantitative Indicators of Law and Policy: International Covenant on Economic, Social and Cultural Rights’ (2015) 37 Human Rights Quarterly 1071, 1098.

<sup>421</sup> Green (n 412) 1065; de Beco (n 416) 24.

<sup>422</sup> Bantekas and Oette (n 362) 423–424; AnnJanette Rosga and Margaret L Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’ (2009) 27 Berkley Journal of International Law 253, 254.

<sup>423</sup> Watchirs (n 417) 718; see also Green (n 412) 1077.

<sup>424</sup> Green (n 412) 1078.

<sup>425</sup> *ibid* 1077; U.N. Human Rights Treaty Bodies, ‘Report On Indicators For Monitoring Compliance With International Human Rights Instruments (2006) UN.Doc. HRI/MC/2006/7’ para 7; OHCHR, ‘Human Rights Indicators: A Guide to Measurement and Implementation (2012) HR/PUB/12/5’ 15.

<sup>426</sup> Green (n 412) 1080.

<sup>427</sup> de Beco (n 416) 47.

<sup>428</sup> Hunt and MacNaughton (n 415) 303.

<sup>429</sup> OHCHR, ‘Human Rights Indicators: A Guide to Measurement and Implementation (2012) HR/PUB/12/5’ (n 425) 28.

Hunt's<sup>430</sup> tri-partite configuration of human rights indicators, as structural, process and outcome based, 'is now well settled.'<sup>431</sup> This configuration 'supports the selection and development of indicators that reflect the obligations to respect, protect and fulfil.'<sup>432</sup> These three types of indicator are not only complementary and interdependent but are also 'only useful if combined with each other.'<sup>433</sup>

Structural indicators look at whether structures which pertain to human rights realisation are in place.<sup>434</sup> They therefore aid in assessing the commitment of a state to implementing the standards it has accepted by ratifying human rights treaties and can look, *inter alia*, towards the adoption of legislation 'and the existence as well as the creation of basic institutional mechanisms deemed necessary for the promotion and protection of human rights.'<sup>435</sup> In this sense, structural indicators have been regarded as showing the intention of a state to 'abide by international human rights law'<sup>436</sup> be measuring *de jure*, as opposed to *de facto*, compliance.<sup>437</sup>

Process indicators instead focus on measuring 'the efforts undertaken by states to implement international human rights.'<sup>438</sup> Such efforts include 'programmes, activities, and

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<sup>430</sup> In 2003, Hunt had proposed a conceptual framework and recommended approach to creating and using indicators in monitoring the right to health. This approach, which relied on three types of indicators-structural, process, and outcome-was later adopted by the OHCHR as the framework for its indicators project.' see Rosga and Satterthwaite (n 422) 294.

<sup>431</sup> Bantekas and Oette (n 362) 425.

<sup>432</sup> OHCHR, 'Human Rights Indicators: A Guide to Measurement and Implementation (2012) HR/PUB/12/5' (n 425) 42.

<sup>433</sup> de Beco (n 416) 45.

<sup>434</sup> Hunt and MacNaughton (n 415) 316–317.

<sup>435</sup> OHCHR, 'Human Rights Indicators: A Guide to Measurement and Implementation (2012) HR/PUB/12/5' (n 425) 34.

<sup>436</sup> de Beco (n 416) 42.

<sup>437</sup> *ibid.*

<sup>438</sup> *ibid* 43.

interventions.’<sup>439</sup> Therefore, the focus is a continuous assessment of the duty-bearer’s acts focusing on the duty bearer’s ‘commitments on the ground.’<sup>440</sup> This focus is on the actions not the outcome of the actions.<sup>441</sup>

In assessing actions both input and output factors can be considered<sup>442</sup> and, additionally, the assessment of process indicators can aid in determining as to whether a failure to realise human rights by a state stems from its inability or instead unwillingness.<sup>443</sup> Building on this, outcome indicators measure the impact of the activities undertaken to implement rights.<sup>444</sup> This is achieved through capturing ‘attainments that reflect the state of enjoyment of human rights in a given context.’<sup>445</sup> In this sense, outcome indicators focus on the results of efforts rather than the efforts themselves.<sup>446</sup> However, it is important to note that outcome indicators alone ‘cannot establish whether a state has failed to comply with its human rights obligations.’<sup>447</sup>

Landman regards quantitative developmental indicators as suitable proxy measures in capturing the extent to which states are realising their ICESCR obligations.<sup>448</sup> Such indicators are, in the form of more general economic and social statistical data, ‘well developed internationally.’<sup>449</sup> Therefore, data to be used in relation to assessing benchmarks and indicators

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<sup>439</sup> OHCHR, ‘Human Rights Indicators: A Guide to Measurement and Implementation (2012) HR/PUB/12/5’ (n 425) 36.

<sup>440</sup> Hunt and MacNaughton (n 415) 316–317.

<sup>441</sup> de Beco (n 416) 43.

<sup>442</sup> Damiano de Felice, ‘Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities’ (2015) 37 Human Rights Quarterly 511, 535.

<sup>443</sup> de Beco (n 416) 48.

<sup>444</sup> Hunt and MacNaughton (n 415) 316–317.

<sup>445</sup> OHCHR, ‘Human Rights Indicators: A Guide to Measurement and Implementation (2012) HR/PUB/12/5’ (n 425) 37.

<sup>446</sup> de Beco (n 416) 43.

<sup>447</sup> *ibid.*

<sup>448</sup> Todd Landman, ‘Measuring Human Rights: Principle, Practice, and Policy’ (2004) 26 Human Rights Quarterly 906, 925.

<sup>449</sup> Watchirs (n 417) 717.

already exists and can come from many sources be that governmental, intergovernmental or non-governmental.<sup>450</sup> This has resulted in there being ‘no problems with obtaining data for’<sup>451</sup> indicators relating to ESCRs. Although it has been highlighted that development and human rights indicators do differ, development indicators can still be used to measure human rights when the two sets of indicators overlap and through supplementing development indicators with other information to give them a human rights lens.<sup>452</sup>

As well as utilising pre-existing data, human rights indicators are in fact already used with the General Comments of treaty bodies specifying ‘the type and role of these indicators.’<sup>453</sup> Additionally, UNDP and World Bank numbers have been used extensively ‘by committees overseeing economic, social and cultural rights, and by NGOs that monitor and report on national human rights compliance issues.’<sup>454</sup> A pertinent example of the use of indicators within the UN system is the universal periodic review in which the CESCR reviews state reports from the review before publishing concluding observations.<sup>455</sup> This process involves an assessment, by the CESCR, of the state’s ‘accomplishments against the benchmarks for progressive realization that were set during their previous review.’<sup>456</sup>

Thus, it is clear that one benefit of using indicators is that they can be utilised without adding to the burden of states as much of the data required for human rights indicators already exists, albeit perhaps in a different form, and that they are already being utilised in submissions to UN bodies.<sup>457</sup> This demonstrates the feasibility and practicality of using benchmarks and

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<sup>450</sup> Bantekas and Oette (n 362) 426.

<sup>451</sup> de Beco (n 416) 40.

<sup>452</sup> *ibid* 28–29.

<sup>453</sup> U.N. Human Rights Treaty Bodies (n 425) para 9.

<sup>454</sup> Green (n 412) 1087.

<sup>455</sup> Heymann et al. (n 420) 1072–1073.

<sup>456</sup> *ibid*.

<sup>457</sup> *ibid* 1096.

indicators.

In addition, benchmarks and indicators have a number of other benefits: they may contribute to the accelerated implementation, and thus realisation, of ICESCR rights. The CESCR has called for the implementation of benchmarks towards such ends.<sup>458</sup> This is because a human rights indicator can act as a proxy in determining the level of rights realisation, and as such the extent to which a state has dispelled its obligations.<sup>459</sup> Thus benchmarks and indicators can link state behaviour more closely to covenant norms.<sup>460</sup> This not only allows progressive realisation to be monitored but, also, ‘can help states, and others, recognize when national and international policy adjustments are required.’<sup>461</sup>

More so, human rights indicators are disaggregated, meaning divided, ‘into specific categories according to the right being monitored and the state under examination.’<sup>462</sup> This is to ensure that they ‘capture the extent to which the process to implement and realize human rights is, for instance, participatory, inclusionary, empowering, non-discriminatory, accountable or, where required, supported by international cooperation.’<sup>463</sup> Through capturing this information ‘indicators can enhance the effectiveness of policies and programmes.’<sup>464</sup>

Indicators are also appealing in relation to ESCRs in that the data informing them can ‘theoretically be verified and consistently measured across time.’<sup>465</sup> This is because, as a

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<sup>458</sup> U.N. Human Rights Treaty Bodies (n 425) para 12.

<sup>459</sup> Kalantry et al. (n 418) 257–258.

<sup>460</sup> Judith V Welling, ‘International Indicators and Economic, Social, and Cultural Rights’ (2008) 30 Human Rights Quarterly 933, 940.

<sup>461</sup> Hunt and MacNaughton (n 415) 305.

<sup>462</sup> de Beco (n 416) 30.

<sup>463</sup> U.N. Human Rights Treaty Bodies (n 425) para 21.

<sup>464</sup> Hunt and MacNaughton (n 415) 308.

<sup>465</sup> Alicia Ely Yamin, ‘The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda’ (2005) 27 Human Rights Quarterly 1200, 1208.

variable conveying information, indicators are ‘consistently measurable.’<sup>466</sup> As they can allow states to monitor progress over time<sup>467</sup> indicators can be used to allow for comparison ‘within countries across time.’<sup>468</sup> This allows progressive realisation to be monitored.

This idea of monitoring progressive realisation links to the concept of accountability. The use of benchmarks and indicators can monitor realisation over time and as such ‘can hold the state to account in relation to the discharge of its responsibilities.’<sup>469</sup> As such they have the potential to enhance, reinforce, and create a culture of accountability.<sup>470</sup> This is through ‘making them commit to a certain performance standard on the issue under assessment.’<sup>471</sup> Further still, framing indicators as being based in human rights as opposed to development shifts the focus from needs towards rights-based approaches which regards individuals as rights holders as opposed to aid recipients.<sup>472</sup>

Additionally, across all walks of life, in business and state decisions, *quantitative* indicators are trusted as they are regarded as data which is ‘understood to be abstract, quantifiable, and putatively transferable.’<sup>473</sup> In this sense, quantitative indicators introduce into international human rights law ‘a form of knowledge production in which numerical measures make visible forms of violation and inequality that are otherwise obscured.’<sup>474</sup> As such, indicators, used in such a way as to be mindful of other limitations, may bring clarity to human

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<sup>466</sup> Kate Raworth, ‘Measuring Human Rights’ (2001) 15 *Ethics & International Affairs* 111, 111.

<sup>467</sup> Hunt and MacNaughton (n 415) 308.

<sup>468</sup> Rosga and Satterthwaite (n 422) 270.

<sup>469</sup> Hunt and MacNaughton (n 415) 308.

<sup>470</sup> U.N. Human Rights Treaty Bodies (n 425) para 3; de Beco (n 416) 28.

<sup>471</sup> U.N. Human Rights Treaty Bodies (n 425) para 12.

<sup>472</sup> de Beco (n 416) 28.

<sup>473</sup> Rosga and Satterthwaite (n 422) 281.

<sup>474</sup> Sally Engle Merry, ‘Measuring the World: Indicators, Human Rights, and Global Governance’ (2011) 52 *Current Anthropology* S83, S84.

rights issues<sup>475</sup> and this may link to the idea of indicators as allowing all those working in regard to one right to ‘speak the same language’.<sup>476</sup>

However, a number of concerns exist in relation to the use of benchmarks and indicators. One such critique relates to concerns in gathering the required data. Contrary to the views espoused above that much of the appropriate data already exists, perhaps in another format, or is already collected by states, it has been suggested that ‘it is not feasible to quantify and measure human rights compliance.’<sup>477</sup> One reason for this suggestion is that human rights realisation cannot be encapsulated in statistical information.<sup>478</sup> This in turn can be based upon the notion of ‘slippage’ whereby indicators do not precisely measure that which they are designed to assess.<sup>479</sup> As well as these limits of measurability, other limits such as the affordability of gathering data exist.<sup>480</sup> This is because, the cost of gathering this data may well act as a barrier to the use of indicators and benchmarks.

Additionally, the focus of indicators is not the individual. This is especially so for quantitative indicators which measure aggregates whilst human rights are held by individuals<sup>481</sup> (and sometimes collectively between a peoples). Thus, it has been suggested that the use of quantitative indicators may be ‘dehumanizing’<sup>482</sup> as the use of statistics may reduce the victims of human rights violations to statistics and omits their lived experiences and thus ‘ignore individual specificity.’<sup>483</sup> This links to the notion of slippage in that the quantitative

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<sup>475</sup> Watchirs (n 417) 726.

<sup>476</sup> Raworth (n 466) 117.

<sup>477</sup> OHCHR, ‘Human Rights Indicators: A Guide to Measurement and Implementation (2012) HR/PUB/12/5’ (n 425) 21.

<sup>478</sup> *ibid.*

<sup>479</sup> Kalantry et al. (n 418) 289.

<sup>480</sup> Rosga and Satterthwaite (n 422) 282.

<sup>481</sup> Merry (n 474) S87.

<sup>482</sup> Landman (n 448) 909–910.

<sup>483</sup> Merry (n 474) S86.

development indicators which have been used as proxies for, and absorbed into, human rights indicators were never designed to monitor the realisation of ESCRs.<sup>484</sup> Thus, quantitative indicators will never give a complete picture of the enjoyment of a right within a specific jurisdiction.<sup>485</sup> Through omitting the individual experience, quantitative indicators are incapable of encapsulating ‘the entire story, and must be supplemented by qualitative description and more in-depth analysis that provides a human dimension to the situation described.’<sup>486</sup> Thus, quantitative indicators may be regarded as a process of ‘simplification and standardization’<sup>487</sup> which may result in large distortions.

Another criticism of benchmarks and indicators is that a tension exists between the view that they should be universal and the view that they should be context-specific. Although the literature accepts that not *all* indicators can be universally applicable across and common to all states,<sup>488</sup> it has been assumed widely that indicators have the potential to be ‘universally applicable across countries.’<sup>489</sup> Context specific indicators are ‘more meaningful and are more likely to be used’<sup>490</sup> and the OHCHR has recognised that there exists ‘a need to strike a balance between universally relevant indicators and contextually specific indicators, as both are needed.’<sup>491</sup> One way of atoning these two tensions, suggested by Kalantry et al., is having a list of universal candidate indicators from which context specific indicators are selected.<sup>492</sup> The

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<sup>484</sup> Rosga and Satterthwaite (n 422) 268.

<sup>485</sup> This contention is extrapolated from a point made specifically in relation to the right to health in Hunt and MacNaughton (n 415) 307.

<sup>486</sup> Yamin (n 465) 1212.

<sup>487</sup> de Felice (n 442) 542.

<sup>488</sup> As ‘realizing rights requires different policy mixes in each country’ Raworth (n 466) 124; As this ‘would not take into account the capacities of each individual state’ de Beco (n 416) 46.

<sup>489</sup> Raworth (n 466) 122.

<sup>490</sup> OHCHR, ‘Human Rights Indicators: A Guide to Measurement and Implementation (2012) HR/PUB/12/5’ (n 425) 22–23.

<sup>491</sup> *ibid* 44.

<sup>492</sup> Kalantry et al. (n 418) 285.



OHCHR adopts a framework which has universally relevant indicators combined with a ‘more detailed and focused assessment of certain attributes of the relevant human right, depending on the requirements of a particular situation.’<sup>493</sup> There exists no standard list of indicators for each human right and the CESCR directs states to specialist organisations such as the WHO, FAO and ILO as opposed to measuring obligations ‘on the basis of predefined lists of criteria.’<sup>494</sup>

### **3.4. The Destitution Threshold**

As the analysis throughout this chapter makes clear, a tension exists between as to whether any minimum level of obligation (such as the destitution threshold) ought to be universal or context-sensitive in nature. It is clear from the above analysis that both universal and context-sensitive approaches to minimum ESCRs entitlements have their advantages. However, it is also clear that each has disadvantages which the other can more easily and readily address. In order for my rights-based definition of destitution to be useful for rights holders in both developing and more developed States, it is clear that the destitution threshold must be constructed in such a way as to address the concerns of both universalists and relativists. Thus, the destitution threshold must have a universal minimum standard that will apply in developing States and this must also be supplemented by a context-sensitive standard which allows contextual factors to influence the standard.

Such an approach reconciles universal and context-sensitive approaches. This reconciliation is crucial to ensure the applicability of my human rights-based definition of destitution across contexts. Such reconciliation is implicit within the application of the destitution themes. This is because the survival needs theme is universal in nature whereas what constitutes vulnerability and indignity will vary by context and is therefore context-

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<sup>493</sup> OHCHR, ‘Human Rights Indicators: A Guide to Measurement and Implementation (2012) HR/PUB/12/5’ (n 425) 44.

<sup>494</sup> Bantekas and Oette (n 362) 426.

sensitive in nature.

One way of achieving these twin aims would be to understand the minimum core obligation as a ‘relative minimum core.’<sup>495</sup> In order to address the concerns of the universalists, which have been levied against the context-sensitive approach to the nature of the minimum core obligation, I would support such an approach only insofar as a universal minimum standard is still maintained. This aligns with Bilchitz’s ‘relative minimum threshold approach’<sup>496</sup> which allows for relativist standards of obligation to be set with the sole exception being that these standards cannot be below the standard found in the minimum core obligation.<sup>497</sup>

This approach, whilst seeking to hold developed States to a higher standard, sets developing states the target to, at worst, dispel the minimum core obligation and for those able to go beyond it, at best, a higher standard.

The approach I envision is one of a composite nature and the destitution threshold may be defined as having two elements. The first of these elements, the universal aspect of this definition, is that the component rights for an individual must be met to the standard of the minimum core obligation in such a way as to not surpass the universal and severe level of indignity and vulnerability which a reliance on charitable assistance for this realisation would amount to. Thus, the universally applicable minimum standard of the destitution threshold is that the core content of the component rights is realised without reliance on charitable assistance. This is representative of the destitution theme of survival needs and a universally minimum standard of the destitution themes of vulnerability and indignity. If the level of rights realisation does not reach this standard, then a person is destitute under my definition.

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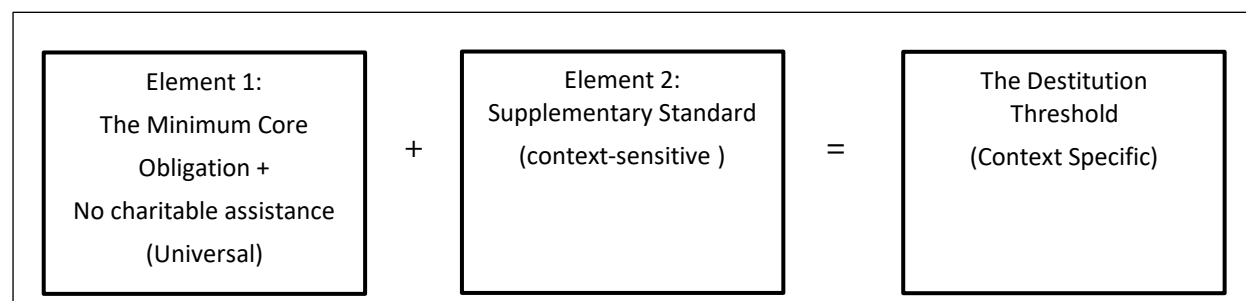
<sup>495</sup> Fuo and Du Plessis (n 324) 15.

<sup>496</sup> Bilchitz, ‘Socio-Economic Rights, Economic Crisis, and Legal Doctrine’ (n 317) 712.

<sup>497</sup> *ibid* 733.

However, the realisation of the minimum core obligation without reliance on charitable assistance forms only the first building block when determining the destitution threshold. This is because, in the context of many states, the standard of realisation required under the minimum core obligation alone is not an appropriate determinant of the destitution threshold: it is too low of a standard. As such this first element must be supplemented by a second context-sensitive element. As this definition is composite in nature, the second element will always be considered *in addition to* the first element. Thus, the destitution threshold will never fall below the level of the minimum core obligation as the second context-sensitive element will always be at least equal to, if not greater than, the minimum core obligation for each component right. In the figure below, even if the context specific second supplementary standard of obligation, is equal to zero the destitution threshold remains equal to the minimum core obligation (See figure 4).

**Figure 4: Conceptualising the Destitution Threshold**



This supplementary standard will directly integrate a contextually relevant understanding of the destitution themes of vulnerability and indignity into the destitution threshold. Thus, the destitution threshold is informed by, and premised upon, the destitution themes. The supplementary standard for any given context must be determined on a case-by-case basis and an example of such a determination will be provided in Part Two of this thesis in applying the destitution threshold to the context of the UK. This is because destitution, like poverty, is experienced differently in different contexts and what may be considered dignified

and secure realisation of one right in one context may be considered undignified and insecure in another. The normative content of each component right will be examined in the following chapter. As will become clear, the normative content can act as a guide in determining the extent to which realisation is free from vulnerability and indignity. It is important to keep an assessment of the availability, accessibility, acceptability, affordability and quality (AAAAQ framework) of the provision in mind when assessing the normative content.

Thus, the destitution threshold can be described as having two, twin, composite elements. Firstly, the universal minimum core obligation and the requirement that the correlative minimum core content is realised without reliance on charitable assistance. Secondly, a context-sensitive supplementary element. This second element considers the normative content of each component right alongside the destitution themes of vulnerability and indignity. A destitution threshold so designed considers an individual to be destitute if any one or more of their component rights are not realised to a level in such a way that each of the concepts of availability, accessibility, acceptability, affordability, and quality are met free from vulnerability and indignity.<sup>498</sup>

Considered through the lens of current approaches to the realisation of ICESCR rights, a destitution threshold so designed may be regarded as relating to progressive obligations. This is despite the inclusion of the minimum core obligation – which creates immediate obligations - within my definition.<sup>499</sup> It would be an unfounded leap to attempt to argue that the mere inclusion of the minimum core obligation transforms the nature of the obligations stemming from the destitution threshold *as a whole* to being of an immediate nature. Rather, from the human rights-based understanding of destitution which I propose, whilst resulting in some immediate obligations (namely the attainment of the minimum core content of the component

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<sup>498</sup> This AAAAQ framework will be addressed in greater detail in chapters 4 and 6.

<sup>499</sup> See section 3.3.1.

rights), stems obligations which are progressive in nature. These progressive obligations are, firstly, *to ensure that the minimum core content of the component rights is realised without reliance on charitable assistance* and, then secondly, to ensure that the component rights *are realised to the context-sensitive destitution threshold without reliance on charitable assistance*.

### **3.5. Concluding Remarks**

This chapter has considered the destitution threshold. In utilising the destitution themes, this chapter has considered existing minimum entitlements in human rights law. This has been in order to determine the standard of the component rights realisation below which an individual can be said to be destitute under my definition.

It is contended that if any one or more of component rights are not realised to the destitution threshold then an individual is destitute under this definition. Additionally, it is contended that the destitution threshold, which is applicable to each component right, must be comprised of two elements: the universally applicable minimum and the context-sensitive supplementary element.

It was demonstrated that the minimum core obligation correlates to survival and subsistence levels and as such the destitution threshold may never fall below this standard of obligation. I have twinned this minimum understanding of survival needs with a minimum understanding of vulnerability and indignity: no reliance on charitable assistance. Therefore, an individual will always be destitute if one or more of the component rights is not realised to the minimum core obligation or if the correlative content of the minimum core obligation can only be realised through a reliance on charitable assistance. This is my universally applicable minimum destitution threshold. However, this analysis also highlighted that this universally applicable minimum may not be the appropriate level for the destitution threshold in the context of all states. This is because the standard of realisation required to dispense of the minimum core obligation may be a much lower level of realisation than what those facing destitution

experience.

It follows that if one or more of the component rights is not realised to the level of the universally minimum destitution threshold that an individual is destitute. However, an individual is also destitute if any one or more of their component rights are not realised to a level in such a way that each of the concepts of availability, accessibility, acceptability, affordability, and quality are met free from vulnerability and indignity. This supplementary standard must be determined on a context-by-context basis. Part Two of this thesis will determine the supplementary standard in the context of the UK. In order to allow this determination to occur, however, the following chapter will identify and examine the component rights in order to allow my human rights-based definition of destitution to be enunciated.

## **Chapter 4: The Component Rights**

### **4.1. Introduction**

This chapter will apply the destitution themes highlighted in chapter two to a determination of the component rights. This will expand the theoretical human rights-based definition of destitution I have offered above by allowing it to go beyond merely stating that an individual can be said to be destitute when their component rights are realised to a level below that of the destitution threshold. This will be achieved through identifying the component rights of my human rights-based destitution definition.

In order to identify rights which may constitute component rights, this chapter will use the destitution themes and the concept of basic needs to highlight specific human rights which align with the destitution themes: the component rights. Following this, each of the identified component rights will be examined in turn. Through analysing both the sources and the content of each component right, the status of each right as a component right will be further justified. This will include highlighting both the minimum core obligation and the normative content of each component right as these two elements are required to determine the destitution threshold. Thus, when considered alongside the destitution threshold established in the previous chapter, the findings of this chapter will allow a human rights-based definition of destitution to be contextualised in Part Two of this thesis.

### **4.2. Identifying the Component Rights**

Chapter 2 highlighted survival needs, vulnerability, and indignity as destitution themes. It has been contended throughout this thesis that the destitution themes can be used to inform the creation of a human rights-based definition of destitution. This necessitates that the destitution themes inform the selection of the component rights. Throughout chapter 2.4.1. a number of human rights were categorised as having the status of basic rights and it was contended that

basic rights align with the destitution themes. However, the notion of social protection was the concept which most readily align with these destitution themes. Social protection further links together the right to an adequate standard of living (ASL) and the right to social security. Thus, the right to an adequate standard of living and the right to social security are component rights for the purposes of my definition. However, as will be made clear below the right to an ASL also contains a number of other rights.<sup>500</sup> These rights are; the right to housing; the right to water; the right to sanitation; the right to food; and the right to clothing. Thus, this chapter also highlights these rights as component rights of my human rights-based definition of destitution.

These rights can be regarded as social rights which ‘improve the lives of individuals and communities’<sup>501</sup> and make ‘it possible for all members of society to enjoy satisfactory conditions of life.’<sup>502</sup> Building upon this, it is clear that these component rights are interlinked through the notion of survival and/or subsistence and that therefore these rights are intertwined with the notion of human health. Taking the preceding analysis further, this chapter will examine the legal basis and content of the component rights.

The tri-partite nature of obligations is imposed by all human rights. Through its General Comments the CESCR has affirmed,<sup>503</sup> and repeatedly reaffirmed,<sup>504</sup> that all human rights

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<sup>500</sup> See section 4.3.1.

<sup>501</sup> Hunt (n 45) 7.

<sup>502</sup> Asbjorn Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in Asbjorn Eide et al (ed), *Economic, Social and Cultural Rights: A Textbook* (Second Revised Edition, Kluwer International Law 2001) 9–28, 13.

<sup>503</sup> Committee on Economic and Social Rights CESCR, ‘General Comment No. 12: The Right to Adequate Food (Art.11) (1999) UN.Doc. E/C.12/1995/5’ para 15.

<sup>504</sup> Committee on Economic and Social Rights CESCR, ‘General Comment No. 13: The Right to Education (Article 13 of the Covenant) (1999) UN.Doc. E/C.12/1999/10’ para 46; CESCR, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)’ (2000) UN.Doc. E/C.12/2000/4’ (n 370) para 33; Committee on Economic and Social Rights CESCR, ‘General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002) UN.Doc. E/C.12/2002/11’ para 20; Committee on Economic and Social Rights CESCR, ‘General Comment No. 17: The Right of Everyone to Benefit from The Protection of The Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1 (C), Of the Covenant) (2005) UN.Doc. E/C.12/GC/1’ para 28; Committee



impose three types of obligations upon States parties: the obligations to respect, to protect, and to fulfil. Even when a General Comment does not expressly state that this tri-partite typology applies to all human rights, the typology is still utilised in defining the extent of specific legal obligations in relation to the content of the specific General Comment alone.<sup>505</sup>

Thus, States parties are obliged to respect, to protect, and to fulfil each of the component rights. Although the exact nature of each of these obligations may differ depending on the right in question, each element of the tri-partite typology of obligations has a generally applicable nucleus. The obligation to respect can be generally summarised as an obligation to refrain from interfering with the enjoyment of a right.<sup>506</sup> The obligation to protect can be summarised generally as an obligation to ensure measures which prevent individuals or enterprises from interfering with the enjoyment of a right.<sup>507</sup> Lastly, the obligation to fulfil can be generally summarised as an obligation to proactively engage in activities intended to further the

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on Economic and Social Rights CESCR, ‘General Comment No. 18: The Right to Work (2006) UN.Doc. E/C.12/GC/18’ para 22; Committee on Economic and Social Rights CESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9) (2007) UN.Doc. E/C.12/GC/19’ para 43; Committee on Economic and Social Rights CESCR, ‘General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) (2009) UN.Doc. E/C.12/GC/21’ para 48; Committee on Economic and Social Rights CESCR, ‘General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (2017) UN.Doc. E/C.12/GC/24’ paras 10–11.

<sup>505</sup> For examples of this see Committee on Economic and Social Rights CESCR, ‘General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights)’ (2005) UN.Doc. E/C.12/2005/’ paras 18–21; Committee on Economic and Social Rights CESCR, ‘General Comment No. 22: The Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2016) UN.Doc. E/C.12/GC/22’ paras 39–48; Committee on Economic and Social Rights CESCR, ‘General Comment No. 23: The Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights) (2016) UN.Doc. E/C.12/GC/23’ paras 58–60.

<sup>506</sup> See Sigrun I Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia 2006) 68–69; In regard to the obligation to [respect] extraterritorially see Magdalena Sepúlveda Carmona, ‘The Obligations of “International Assistance and Cooperation” under the International Covenant on Economic, Social and Cultural Rights. A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8’ (2009) 13 *The International Journal of Human Rights* 86, 90.

<sup>507</sup> In regard to the obligation to protect extraterritorially see Sepúlveda Carmona (n 506) 90.

enjoyment of a right.<sup>508</sup> This tri-partite typology will contribute to the examination of the component rights which will take place below.

### **4.3. Examining the Component Rights**

#### ***4.3.1. The Right to an Adequate Standard of Living***

The right to an adequate standard of living (ASL) is recognised in Article 11(1) of the ICESCR<sup>509</sup> which states that: ‘The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’<sup>510</sup> This ‘definition is thus inclusive not exhaustive, indicating the breadth of the provision.’<sup>511</sup>

It is clear therefore that this umbrella social right encompasses the key themes extrapolated from the analysis of the destitution definitions highlighted in the previous chapter of this thesis. The right to an ASL has been argued by Eide to be the ‘core’ of social rights<sup>512</sup> and beyond the ICESCR this right is embedded in Article 25 of the UDHR<sup>513</sup> as well as other sources including, *inter alia*, in CRC provision.<sup>514</sup> Eide contends that Article 11 ICESCR, along with other subsequent guarantees, has legally strengthened the notion of an ASL as elaborated

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<sup>508</sup> In regard to the obligation to fulfil (promote) extraterritorially see *ibid* 92.

<sup>509</sup> Committee on Economic and Social Rights CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (1991) E/1992/23’ para 1; Just Fair, ‘Implementation of the International Covenant on Economic, Social and Cultural Rights in the United Kingdom of Great Britain and Northern Ireland. Parallel Report: Submission to the Committee on Economic, Social and Cultural Rights’ (Just Fair 2015) 82 <<http://justfair.org.uk/wp-content/uploads/2018/05/Implementation-of-the-ICESCR-Parallel-Report.pdf>>.

<sup>510</sup> ICESCR Article 11 (1).

<sup>511</sup> Stephen James, ‘A Forgotten Right? The Right to Adequate Clothing in the Universal Declaration of Human Rights’ in Robert Garbutt (ed), *Activating Human Rights and Peace: Universal Responsibility Conference 2008 Conference Proceedings* (Centre for Peace and Social Justice 2010) 13-19,14.

<sup>512</sup> Eide, ‘Economic, Social and Cultural Rights as Human Rights’ (n 502) 17–18.

<sup>513</sup> UDHR (n 8) Article 25.

<sup>514</sup> Convention on the Rights of the Child CRC, ‘(Adopted on 20 November 1989 UN.Res.44/25/1989)’ Article 27.

on in Article 25 of the UDHR.<sup>515</sup> Article 25 was, in turn, inspired by Roosevelt's Four Freedoms address and especially the notion of freedom from want<sup>516</sup> and can be regarded as an elaboration of Article 1 of the UDHR, pertaining to dignity. This is because 'a life in dignity requires an adequate standard of living.'<sup>517</sup>

Difficulties exist in considering the right to an ASL as distinctive from the rights which form its constituent parts. This is amplified by the fact that 'the term adequate standard of living has not been given a more precise definition in the relevant international instruments'<sup>518</sup> with its meaning being understood from the context.<sup>519</sup> That context being the basic necessities which are highlighted within the Articles pertaining to the right to ASL and which will be elaborated upon in the following sections. This demonstrates that a lack of attention has been paid to the right to an ASL as a holistic concept.

Considering the right to an ASL holistically, all individuals should have dignified enjoyment of their basic needs.<sup>520</sup> Eide contends that an ASL goes beyond the basic necessities referred to in the numerous international instruments but that exactly how far beyond this is dependent upon the societal conditions under consideration and, as such, 'cannot be stated in general terms.'<sup>521</sup> This notion, of an ASL going beyond the basic necessities named within the instruments, is representative of an holistic view of the right to an ASL. This view differs from the approach towards ASL which has generally understood the right as being made up of the

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<sup>515</sup> Eide, 'Adequate Standard of Living' (n 114) 187.

<sup>516</sup> *ibid* 186.

<sup>517</sup> *ibid* 187.

<sup>518</sup> Asbjorn Eide, 'The Right to an Adequate Standard of Living Including the Right to Food' in Asbjorn Eide et al (ed), *Economic, Social and Cultural Rights: A Textbook* (Second Revised Edition, Kluwer International Law 2001) 133–148, 133.

<sup>519</sup> *ibid*.

<sup>520</sup> Eide, 'Adequate Standard of Living' (n 114) 187.

<sup>521</sup> *ibid*.

other more tangible rights inherent within its definition.

Eide posits that the essential point of an adequate standard of living

‘is that everyone shall be able, without shame and without unreasonable obstacles, to be a full participant in ordinary, everyday interaction with other people. This means, *inter alia*, that they shall be able to enjoy their basic needs under conditions of dignity. No one shall have to live under conditions whereby the only way to satisfy their needs is by degrading or depriving themselves of their basic freedoms, such as through begging, prostitution or bonded labour.’<sup>522</sup>

As such, ‘in purely material terms’<sup>523</sup> this implies living above the context specific poverty line.<sup>524</sup> It must be observed that the realisation of the right to an ASL depends not only on the efforts of the individual but also the obligations of the state which are subsidiary to this and ‘come fully into play only when individuals cannot or do not manage by themselves to secure their own or their dependants’ standard of living.’<sup>525</sup>

In his capacity as Chairperson of the CESCR, Phillip Alston, held that the right to an adequate standard of living is composed of several elements ‘as a matter of logic.’<sup>526</sup> Building upon this, Alston argued that the right to the overall package of ASL rights entails a right to the constituent parts.<sup>527</sup> It follows that rights exist to both a holistic ASL as well as to the constituent parts. Hohmann argues that a minimum basic content exists in relation to the right to an ASL, and that this content ‘ensures subsistence to all people in the form of food, clothing, housing

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<sup>522</sup> Eide, ‘The Right to an Adequate Standard of Living Including the Right to Food’ (n 518) 133.

<sup>523</sup> *ibid* 133–134.

<sup>524</sup> *ibid*.

<sup>525</sup> Eide, ‘Adequate Standard of Living’ (n 114) 188.

<sup>526</sup> Phillip Alston, ‘Letter Addressed by the Chairperson to the Committee on Economic, Social and Cultural Rights to Mr. Wally N’Dow, Assistant Secretary-General, United Nations Centre for Human Settlements (Habitat)’ UN. Doc E/C.12/1995/18, Annex VII’ (1995) para 10.

<sup>527</sup> *ibid*.

and necessary conditions of care.’<sup>528</sup> The enjoyment of these subsistence rights has been labelled as that which is minimally required for the enjoyment of an ASL.<sup>529</sup> Furthermore, it is clear that the elements of the right to an ASL have their own legal content entailing legal obligations for the state.<sup>530</sup> As such these elements of the right to an ASL will be considered in the following sections.

#### **4.3.2. *The Right to Clothing***

Clothing is one of life’s fundamentals<sup>531</sup> and refers to tangible or material objects which are obtained and attached to, or worn, on the human body.<sup>532</sup> Through focusing on the needs fulfilled by clothing, clothing has been identified by some psychologists ‘as a basic human need, along with food and shelter.’<sup>533</sup> This goes some way towards explaining the inclusion of the right to clothing as ‘part of the more general right to an adequate standard of living.’<sup>534</sup> Therefore most prominently, the right is enshrined in international human rights law in Article 25 of the UDHR and Article 11 of the ICESCR.

Despite this prominence, very little research has been undertaken in regard to the right to adequate clothing with the right being largely neglected by the CESCR.<sup>535</sup> In fact, other than being listed in relation to the right to an ASL the right to clothing has hardly been referred to by the CESCR<sup>536</sup> with Saul et al’s survey of the CESCR’s concluding observations finding that

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<sup>528</sup> Hohmann (n 310) 7.

<sup>529</sup> Eide, ‘Economic, Social and Cultural Rights as Human Rights’ (n 502) 17–18.

<sup>530</sup> Jessie Hohmann, ‘Protecting the Right to Housing in England: A Context of Crisis’ (Just Fair 2015) 17–18 <<https://www.qmul.ac.uk/law/media/law/docs/news/154442.pdf>> accessed 7 February 2020.

<sup>531</sup> George W Hartmann, ‘Clothing: Personal Problem and Social Issue’ (1949) 41 *Journal of Home Economics* 295.

<sup>532</sup> Susan B Kaiser, *The Social Psychology of Clothing* (Second Edition, Macmillan 1990) 5.

<sup>533</sup> *ibid* 19.

<sup>534</sup> James (n 511) 13.

<sup>535</sup> *ibid*.

<sup>536</sup> Ben Saul et al., *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014) 925.

clothing was only brought up in the early sessions of the CESCR: ‘as if the committee was itself trying to work out what the content and meaning of the right might be in practice.’<sup>537</sup>

Thus, the supposedly equal place of the right to clothing ‘within the context of securing an adequate standard of living under Article 11 is somewhat belied by the practice towards the right to clothing.’<sup>538</sup> This is exemplified by the fact that, unlike the rights to food, water and housing, the right to clothing does not have its own UN agency.<sup>539</sup> As well as this, the right to clothing has not benefited from the work of a specific Special Rapporteur or a specific General Comment. Consequently, the minimum core obligations pertaining to the right to clothing have not been expressly determined by the CESCR.

Despite this neglect, the right to clothing has been included in relation to ‘the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development’<sup>540</sup> and the CRC requires States Parties to provide assistance to parents towards the realisation of this right. This assistance should give particular ‘regard to nutrition, clothing and housing.’<sup>541</sup> Additionally, linking the Right to Clothing to the Right to Social Security, clothing is specified as one of the elements which should ordinarily be covered by family and child benefits under the right to social security.<sup>542</sup> This suggests that individuals who have inadequate clothing should receive aid in realising the right to adequate clothing under

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<sup>537</sup> *ibid.*

<sup>538</sup> *ibid* 924.

<sup>539</sup> *ibid.*: for examples of these agencies see; UN-HABITAT whose mission is to ‘promote socially and environmentally sustainable human settlements development and the achievement of adequate shelter for all’ <<https://unhabitat.org/un-habitat-at-a-glance/>> accessed on 16<sup>th</sup> July 2018; UN-water whose role ‘is to coordinate so that the UN family ‘delivers as one’ in response to water related challenges.’ <<http://www.unwater.org/about-unwater/>> Accessed 16<sup>th</sup> July 2018; the Food and Agriculture Organization (FAO) ‘The Food and Agriculture Organization (FAO) is specialized agency of the United Nations that leads international efforts to defeat hunger.’ <<http://www.fao.org/about/en/>> Accessed 16<sup>th</sup> July 2018

<sup>540</sup> CRC (n 514) Article 27 (1).

<sup>541</sup> *ibid* Article 27 (3).

<sup>542</sup> CESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9) (2007) UN.Doc. E/C.12/GC/19’ (n 504) para 18.

not only the right to clothing but also the right to social security. This also suggests that an individual with inadequate clothing is socially insecure.

Saul *et al.* identify the CESCR's General Comment Number 5 as holding that the right to clothing has 'special significance'<sup>543</sup> in relation to persons with disabilities. This special significance relates to the 'particular clothing needs'<sup>544</sup> of such persons which must be met in order 'to enable them to function fully and effectively in society.'<sup>545</sup> Finally, Saul *et al.* highlight that during the formative debates, influencing the drafting of the ICESCR, 'clothing was considered imperative.'<sup>546</sup> This sub-section therefore demonstrates that the right to clothing is expressly codified as an element of the right to an adequate standard of living; that it links directly to the provision of the right to social security; and that in relation to specific groups of persons the right to clothing has been repeatedly reaffirmed at the international level.

Although discredited as explaining initial motivations for wearing clothing, 'because clothing is thought to have originated in tropical regions of the world where there was the least need for protection against the climate,'<sup>547</sup> the notion of clothing as protection has been highlighted as a function of clothing.<sup>548</sup> Thus clothing can be regarded as protection<sup>549</sup> and an assessment of the literature highlights protection from temperature and other environmental factors as well as protection in the work place as two categories of protection in relation to clothing.

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<sup>543</sup> Saul *et al.* (n 536) 925.

<sup>544</sup> Committee on Economic and Social Rights CESCR, 'General Comment No. 5: Persons with Disabilities (1994) UN.Doc. E/1995/22' para 33.

<sup>545</sup> *ibid.*

<sup>546</sup> Saul *et al.* (n 536) 924.

<sup>547</sup> Kaiser (n 532) 17.

<sup>548</sup> Malcolm Barnard, *Fashion as Communication* (Second Edition, Routledge 2002) 21.

<sup>549</sup> *ibid* 51.

Clothing offers protection against nature's elements<sup>550</sup> and the examples of insufficiently warm clothing in cold climates; inappropriately warm clothing in warmer climates and exposure to ultraviolet rays are cited by James as examples of types of protection that clothing can provide against environmental factors.<sup>551</sup> These examples are, however, offered with the caveat that James is not an expert in the textile industry, health sciences, or social work.<sup>552</sup> As such it is crucial to ensure that a multidisciplinary approach is taken in assessing these claims further.

The link drawn by the CESCR between the population's clothing supply and a country's harsh climate, pertaining to observations made upon Mongolia's second periodic report on the ICESCR,<sup>553</sup> demonstrates that the notion of clothing being linked to the individual's environment is a human rights concern. Clothing can protect the body from both heat and cold<sup>554</sup> through 'preserving the balance between body heat and the outside environment.'<sup>555</sup> In relation to offering protection from the cold, this is achieved through clothing preventing 'excessive heat loss from the human body.'<sup>556</sup> In this sense, clothing is a behavioural adaption aimed at 'maintaining core body temperature'<sup>557</sup> despite hot or cold conditions. A lack of such protection may result in fluctuations in core body temperature which in turn may have serious health implications. Additionally, these health implications may ultimately lead to death.

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<sup>550</sup> Saul et al. (n 536) 924.

<sup>551</sup> James (n 511) 15.

<sup>552</sup> *ibid.*

<sup>553</sup> Committee on Economic and Social Rights CESCR, 'Report on the Second Session: Supplement No. 4 (1988) UN.Doc. E/C.12/1988/4', para 81.

<sup>554</sup> Barnard (n 548) 51.

<sup>555</sup> Masako Niwa, 'The Importance of Clothing Science and Prospects for the Future' (2002) 14 *International Journal of Clothing Science and Technology* 238, 238.

<sup>556</sup> Anna Katarzyna Dabrowska, 'The Impact of Structural Solutions Used in Clothing Protecting against Cold on Its Thermal Insulation' (2016) 28 *International Journal of Clothing Science and Technology* 805, 806.

<sup>557</sup> Simon Annaheim et al., 'A New Method to Assess the Influence of Textiles Properties on Human Thermophysiology. Part I Thermal Resistance' (2015) 27 *International Journal of Clothing Science and Technology* 272, 272–273.



Additionally, individual's around the world work in environments which expose them to specific risks from which their bodies need protection.<sup>558</sup> This suggests that another test for the adequacy of clothing is as to whether it provides the appropriate workplace protection. Linking to temperature, although such workplace protection goes beyond this, 'the feeling of thermal discomfort while working directly translates into the quality of the performed tasks, including the efficiency of work.'<sup>559</sup> Thus, adequate clothing will allow workers to work more efficiently than inadequate clothing. As well as this, inappropriately fitting clothing, especially in the workplace, 'can adversely affect the wearer's mobility and, for protective clothing, can impact the level of protection.'<sup>560</sup> As such the fit of clothing will contribute to any assessments of its adequacy.

The wearing of clothes has associated health and safety risks<sup>561</sup> with, for example, some fabrics being prone to microorganisms which affect 'clothing products thus affecting human health, like risking cases on foot inflammation, bedsore, allergies.'<sup>562</sup> Other factors for consideration in relation to the links between clothing and health include the ventilation and breathability of materials; whether the clothing aggravates allergies and skin conditions; and ill-fitting footwear as contributing to serious injuries.<sup>563</sup> Moreover, the fit of clothing also has implications for the health of the wearer. For example, 'some recent studies showed that the use of tight trousers causes the restriction of multiple joints in the lumbo-pelvic and hip regions, leading to alterations in the trunk's muscle activity and in the person's motion patterns and

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<sup>558</sup> Roshan Shishoo, 'Recent Developments in Materials for Use in Protective Clothing' (2002) 14 *International Journal of Clothing Science and Technology* 201, 201.

<sup>559</sup> Dabrowska (n 556) 805.

<sup>560</sup> Sara Braganca et al., 'Work-Wear Pattern Design to Accommodate Different Working Postures' (2017) 29 *International Journal of Clothing Science and Technology* 294, 295.

<sup>561</sup> Ndwiga Duncan Kariuki et al., 'Clothing Standards Compliance Assessment' (2014) 26 *International Journal of Clothing Science and Technology* 377, 379.

<sup>562</sup> *ibid* 379–380.

<sup>563</sup> James (n 511) 15.

biomechanics of the remaining unrestricted joints.’<sup>564</sup> These issues can contribute *inter alia* to lower back pain, disability, neurological problems, heartburn, reflux and bladder problems.<sup>565</sup>

Therefore, I support the contention that ‘immediately one can see the link between the human right to adequate clothing and to health.’<sup>566</sup> This link affirms the importance of adequate clothing for human well-being.<sup>567</sup> Even beyond these effects on physical aspects of health, the mental and psychological effects of not having access to adequate clothing must not be underestimated. For example, dirty, damaged and/or outdated clothing ‘can be an invitation to other people to treat the wearer with contempt and ridicule’<sup>568</sup> contributing to the stigma of poverty. ‘Clothing and fashion are often used to indicate social worth or status’<sup>569</sup> and in this sense items of clothing may be regarded as ‘social hieroglyphics... which conceal, even as they communicate, the social position of the wearer.’<sup>570</sup> This notion of concealment links to the idea of wearing certain fashion or clothing to ‘fit in’<sup>571</sup> which further links to the notion of clothing as protection from various kinds of fears including ‘fear of ridicule’<sup>572</sup> and fear of being judged as poor.<sup>573</sup>

Additionally, inadequate clothing can contribute to exclusion from, *inter alia*; education, as a result of a lack of or incorrect uniform;<sup>574</sup> from employment, due an inability to gain employment perhaps by not owning a suit to wear to an interview or due to an inability to

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<sup>564</sup> Braganca et al. (n 560) 295.

<sup>565</sup> *ibid.*

<sup>566</sup> James (n 511) 14.

<sup>567</sup> *ibid.*

<sup>568</sup> *ibid* 15.

<sup>569</sup> Barnard (n 548) 61.

<sup>570</sup> *ibid* 9.

<sup>571</sup> *ibid* 56–57.

<sup>572</sup> Kaiser (n 532) 19.

<sup>573</sup> *ibid.*

<sup>574</sup> See chapter 6.3.2. (n 1105-1108)

acquire the protective clothing required to undertake the role; as well as from social opportunities and experiences.

Further, in some contexts those who lack access to certain items of clothing face increased vulnerabilities. For example, the charity ‘Smalls for All’ state on their website that, although the claim cannot be made that access to underwear actually prevents sexual assaults, ‘we know from speaking to the women we help in Africa that having underwear makes them feel more secure.’<sup>575</sup> This further evidences the importance of the right to clothing. Additionally, the CESCR has requested to receive information on the measures taken in promoting and improving the realisation of the right to clothing<sup>576</sup> and Panama responded by highlighting that it ‘had concluded agreements with clothing manufacturers to provide, at reduced cost, uniforms and shoes for needy schoolchildren.’<sup>577</sup> This is demonstrative of the types of measures which can be undertaken in contributing to the realisation of the right to clothing.

From these observations, it is clear that the adequacy of clothing varies by context. Although these contextual factors such as climate contribute to the assessment of adequacy, individual factors are also evident including, *inter alia*, size, fit and allergies. Therefore, factors to be considered in relation to the quality of a garment include, *inter alia*, fit, durability in regard to wear and maintenance, and lack of harm to the wearer.<sup>578</sup> More so, themes from the CESCR’s clarification of other constituent rights of the right to an ASL can also contribute to clarifying the content of the right to clothing. For example, it has been observed that, in terms of realising the right to food, the right includes the requirement that the food corresponds ‘to

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<sup>575</sup> Smalls for All, ‘FAQs: By Saying That Young Women Feel More Secure If They Have Underwear, Do You Mean It Can Prevent Attacks/Rape?’ <<http://smallsforall.org/get-involved/faqs/>> accessed 5 June 2018.

<sup>576</sup> Committee on Economic and Social Rights CESCR, ‘Report on the Sixth Session (1992) UN.Doc. E.C.12/1991/4’ para 117.

<sup>577</sup> *ibid* 120.

<sup>578</sup> Kariuki et al. (n 561) 379.

the cultural traditions of the people to which the consumer belongs.’<sup>579</sup> It is contended that, if consideration as to cultural appropriateness must be made in relation to the right to food then such consideration must also be made in relation to the right to clothing. This is because these rights are similar in that they both form a part of the right to an adequate standard of living.

#### **4.3.3 The Right to Housing**

The right to housing refers ‘to the human rights, as codified in or implied into international and regional rights treaties and declarations, and into domestic constitutional orders through bills or declarations of rights’<sup>580</sup> which relate to housing. This right was spelled out ‘unambiguously’<sup>581</sup> in the UDHR 1948. However, it is set within the broader enjoyment of, and derived from,<sup>582</sup> the right to an ASL by Article 11(1) of the ICESCR.<sup>583</sup> Although other instruments address the right to housing Article 11(1) ICESCR is significant<sup>584</sup> as well as being ‘the most comprehensive and perhaps the most important of the relevant provisions.’<sup>585</sup> This is because it established, for the first time, legally binding obligations in relation to the right to housing for the states parties.

In the European context, the European Social Charter (ESC) and its revised version contain various articles ‘which protect the right to housing in some aspect.’<sup>586</sup> Further, albeit

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<sup>579</sup> Jean Ziegler and others, *The Fight for the Right to Food: Lessons Learned* (Palgrave Macmillan 2011) 14.

<sup>580</sup> Hohmann (n 310) 5–6.

<sup>581</sup> Dan Chong, ‘How Human Rights Can Address Socioeconomic Inequality’ in Douthett Lettinga and Lars van Troost (eds), *Can Human Rights Bring Social Justice: Twelve Essays* (Amnesty International Netherlands 2015) 19–25, 20.

<sup>582</sup> CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (1991) E/1992/23’ (n 509) para 1.

<sup>583</sup> Hohmann (n 530) 17–18.

<sup>584</sup> Scott Leckie, ‘The Human Right to Adequate Housing’ in Asbjorn Eide et al (ed), *Economic, Social and Cultural Rights: A Textbook* (Second Revised Edition, Kluwer International Law 2001) 149–168, 153.

<sup>585</sup> CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (1991) E/1992/23’ (n 509) para 3.

<sup>586</sup> Hohmann (n 530) 17.

indirectly through the use of other rights, right to housing claims have been addressed before the European Court of Human Rights ‘under Article 8 of the ECHR (right to private and family life), and Article 1 of Protocol Number. 1 (peaceful enjoyment of possessions).’<sup>587</sup>

The right to housing ‘is of central importance for the enjoyment of all economic, social and cultural rights.’<sup>588</sup> This is not simply given its place within the right to an ASL but also because ‘homelessness often results in the violation of a host of other human rights, from privacy to health, and in the inability to exercise civic human rights such as the right to vote.’<sup>589</sup> More so, living in inadequate, or in fact without, housing or shelter ‘is precarious in terms of coping on an everyday basis, and to secure the fulfilment of many other human rights, such as the right to adequate food and to health.’<sup>590</sup> Given its linkages, inadequate access to housing contributes to the non-realisation of a range of other human rights.<sup>591</sup> It is clear, on account of this, that the right to housing is intimately linked to both poverty and survival and as such the right to housing constitutes a component right of the rights-based definition of destitution. This is given its place as a ‘necessary basis of subsistence, adequate housing facilitates human participation in the life of the community.’<sup>592</sup> It is perhaps because of this that some aspects of the right to housing are required to be immediately implemented and are not subject to progressive realisation.<sup>593</sup>

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<sup>587</sup> Leckie (n 584) 158–159.

<sup>588</sup> CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (1991) E/1992/23’ (n 509) para 1.

<sup>589</sup> Hohmann (n 530) 24.

<sup>590</sup> Skogly (n 18) 68.

<sup>591</sup> Marks and Clapham (n 224) 210; Leckie (n 584) 167; Skogly (n 18) 68; CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (1991) E/1992/23’ (n 509) para 7.

<sup>592</sup> Hohmann (n 310) 8.

<sup>593</sup> Eoin Rooney and Mira Dutschke, ‘Eoin Rooney and Mira Dutschke ‘The Right to Adequate Housing: A Case Study of the Social Housing Budget in Northern Ireland’ in Aoife Nolan et al. (ed), *Human Rights and the Public Finance* (Hart Publishing 2013) 195–217, 197.

Although the CESCR does not use the term ‘minimum core’ in its fourth<sup>594</sup> or seventh<sup>595</sup> General Comments, which address the right to housing and forced evictions respectively, the CESCR ‘does note that the state is *prima facie* violating its obligations if a significant number of individuals are deprived of ‘basic shelter.’<sup>596</sup> Thus ‘one can safely assume that ‘basic shelter’ constitutes the minimum core of the right to housing.’<sup>597</sup> Therefore an individual will always be destitute if they do not have access to basic shelter.

However, the CESCR has interpreted the right to housing to go beyond ‘a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head.’<sup>598</sup> The right to adequate housing should therefore ‘be seen as the right to live somewhere in security, peace and dignity.’<sup>599</sup> One of the reasons provided by the CESCR for this interpretation is that Article 11(1) ICESCR enshrines not merely a right to housing but, more broadly, a right to adequate housing.<sup>600</sup> This notion of adequacy, in regards to housing, has a number of implications. Adequate shelter should be adequately private, adequately spacious, adequately secure, adequately lit and adequately ventilated, with ‘adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.’<sup>601</sup> Bone regards secure, affordable and decent housing as a crucial pillar ‘of stability within the potentially bewildering milieu of modern societies.’<sup>602</sup> Further, Leckie offers the case

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<sup>594</sup> CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (1991) E/1992/23’ (n 509).

<sup>595</sup> Committee on Economic and Social Rights CESCR, ‘General Comment No. 7: The Right to Adequate Housing (Art. 11 (1) of the Covenant): Forced Evictions (1997) E/1998/22’.

<sup>596</sup> Rooney and Dutschke (n 593) 198.

<sup>597</sup> *ibid.*

<sup>598</sup> CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (1991) E/1992/23’ (n 509) para 7.

<sup>599</sup> *ibid.*

<sup>600</sup> *ibid.*

<sup>601</sup> *ibid.*

<sup>602</sup> John Bone, ‘Neoliberal Nomads: Housing Insecurity and the Revival of Private Renting in the UK’ (2014) 19 Sociological Research Online s.10.1 <<http://www.socresonline.org.uk/19/4/1.html>>.

of *Guzzardi v Italy*<sup>603</sup> as evidence for the contention that, although the state need not provide housing accommodation, ‘public authorities are under an obligation to ensure that they do not impose intolerable living conditions on a person or family.’<sup>604</sup> This affirms the link between the right to adequate housing and conditions of accommodation.

The CESCR holds that there are certain aspects of adequacy which transpose between contexts.<sup>605</sup> These factors include: legal security of tenure;<sup>606</sup> availability of services, materials, facilities and infrastructure;<sup>607</sup> affordability;<sup>608</sup> habitability;<sup>609</sup> accessibility;<sup>610</sup> location;<sup>611</sup> and cultural adequacy.<sup>612</sup> In its Concluding Observations on the UK’s report, the CESCR recommended that the U.K. take action in regard to substandard and uninhabitable housing.<sup>613</sup> This suggests that the quality of the accommodation forms a part of the adequacy assessment.

The preceding paragraphs demonstrate that the right to housing incorporates the adequacy of housing. This assessment of adequacy can be extended to the enjoyment of utilities, to some of which individuals can make separate and independent rights-claims. Leckie, for example, suggests that the legal content of the right to housing includes, *inter alia*, a right to housing which is habitable, has electricity and has, if necessary, heating.<sup>614</sup> The case

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<sup>603</sup> *Guzzardi v Italy* [1980] European Court of Human Rights 3 EHRR 333.

<sup>604</sup> Leckie (n 584) 160.

<sup>605</sup> CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (1991) E/1992/23’ (n 509) para 8.

<sup>606</sup> *ibid* 8 (a).

<sup>607</sup> *ibid* 8 (b).

<sup>608</sup> *ibid* 8 (c).

<sup>609</sup> *ibid* 8 (d).

<sup>610</sup> *ibid* 8 (e).

<sup>611</sup> *ibid* 8 (f).

<sup>612</sup> *ibid* 8 (g).

<sup>613</sup> Committee on Economic and Social Rights CESCR, ‘Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ (2016) E/C.12/GBR/CO/6’ para 50 (c).

<sup>614</sup> Leckie (n 584) 150.

of *FEANTSA V France*, before the European Committee of Social Rights, is quoted by Hohmann as defining adequate housing as

‘a dwelling which is safe from a sanitary and health point of view, that is, possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity; is structurally secure; not overcrowded; and with secure tenure supported by law.’<sup>615</sup>

Additionally, the Special Rapporteur on the right to housing has recognised the links between the rights to water, sanitation, and housing through emphasising that the full enjoyment of the right to housing is ‘interlinked with and contingent upon fulfilment of other rights and services, including access to safe drinking water and sanitation.’<sup>616</sup> Therefore, access to sanitation facilities has generally been understood to be included within the right to adequate housing with it being ‘difficult to imagine characterizing a habitation as adequate if sanitation facilities are not available within the vicinity or are inadequate or unsafe to use.’<sup>617</sup> This demonstrates how the separate and independent rights to water and sanitation can be considered, in contexts where access to them through the household is considered the norm, concurrently with the right to adequate housing. These rights will be explored in further detail below.

#### ***4.3.4. The Right to Food***

Van Bueren highlights that the League of Nations’ 1924 Declaration of the Rights of the Child contains, as one of its five substantive articles, a right to food.<sup>618</sup> This right was also

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<sup>615</sup> Hohmann (n 310) 55.

<sup>616</sup> Miloon Kothari, ‘Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living’ (United Nations 2002) E/CN.4/2002/59 para 56 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/111/29/PDF/G0211129.pdf?OpenElement>>.

<sup>617</sup> Catarina de Albuquerque, ‘Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation (2009) UN.Doc. A/HRC/12/24’ para 20.

<sup>618</sup> Geraldine Van Bueren, ‘Socio-Economic Rights and a Bill of Rights - an Overlooked British Tradition’ [2013] Public Law 821, 835.



‘unambiguously spelled out’<sup>619</sup> in the 1948 UDHR. These international instruments demonstrate the frequent reaffirmation of the right to food by the international community. However, even despite this ‘a disturbing gap still exists between the standards set in Article 11 of the Covenant and the situation prevailing in many parts of the world.’<sup>620</sup> The right to food forms part of the minimum basic content of the right to an adequate standard of living which ensures subsistence for all people.<sup>621</sup> Consequently, ‘there can be no question that the human right to adequate food is a basic right.’<sup>622</sup> This places it firmly within the category of component right in relation to my rights-based destitution definition.

Beyond Article 11(1) ICESCR, ‘Article 11(2) guarantees the fundamental right of everyone to be free from hunger’<sup>623</sup> and this right has been ‘indivisibly linked to the inherent dignity of the human person’<sup>624</sup> in being ‘indispensable for the fulfilment of other human rights.’<sup>625</sup> The CESCR has further linked the right to food to policies orientated to the ‘eradication of poverty and the fulfilment of all human rights for all.’<sup>626</sup> Beyond these direct sources, the right to food can also be found indirectly and claimed through provisions not explicitly guaranteeing a right to food. Cahill and Skogly have highlighted claims brought under the right to life before the Indian Constitutional Court as demonstrating this contention with the Court linking the right to food to human dignity.<sup>627</sup> This highlights the interdependence

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<sup>619</sup> Chong (n 581) 20.

<sup>620</sup> CESCR, ‘General Comment No. 12: The Right to Adequate Food (Art.11) (1999) UN.Doc. E/C.12/1995/5’ (n 503) para 5.

<sup>621</sup> Hohmann (n 310) 7.

<sup>622</sup> George Kent, *Freedom from Want* (Georgetown University Press 2005) 49.

<sup>623</sup> Just Fair (n 509) 82.

<sup>624</sup> CESCR, ‘General Comment No. 12: The Right to Adequate Food (Art.11) (1999) UN.Doc. E/C.12/1995/5’ (n 503) para 4.

<sup>625</sup> *ibid.*

<sup>626</sup> *ibid.*

<sup>627</sup> Cahill-Ripley and Skogly (n 19) 132.

of human rights which can broaden the range of protections available ‘but conversely can leave gaps in provision or weakness in proving a case.’<sup>628</sup>

For some, a lack of adequate food is the ‘ultimate criterion of poverty.’<sup>629</sup> This is because, given that food is a basic survival need, the activity of acquiring food diverts the efforts of those in poverty away from other pressing issues with the struggle for their next meal becoming an impoverished person’s ‘immediate and all-consuming activity.’<sup>630</sup> In this sense, lack of adequate food and the all-consuming activity of acquiring one’s next meal, has psychological implications, which in turn has implications for mental health and thus health more broadly, given that this activity results in an ‘unbearable nagging dread.’<sup>631</sup> This firmly places the right to food within not only the sphere of survival needs and rights but also of poverty. Consequently, this thesis considers the right to food as a component right of a rights-based definition of destitution.

A 2010 Office of the High Commissioner for Human Rights (OHCHR) fact sheet stipulates that the right to food does not constitute a right to be fed but is rather a right to feed oneself in conditions of dignity, whereby individuals live in such conditions as to allow them to produce their own food or instead to buy it.<sup>632</sup> Therefore, the realisation of the right to adequate food requires individuals to ‘have physical and economic access at all times to adequate food or means for its procurement.’<sup>633</sup> This realisation also goes beyond conceptions

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<sup>628</sup> *ibid* 134.

<sup>629</sup> Narayan and others (n 134); quoted in Skogly (n 18) 66.

<sup>630</sup> Skogly (n 18) 66.

<sup>631</sup> Ziegler and others (n 579) 18.

<sup>632</sup> Office of the High Commissioner for Human Rights OHCHR, ‘The Right to Adequate Food: Fact Sheet No. 34’ <<https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>> accessed 31 January 2020; quoted in Saul et al. (n 536) 869–870.

<sup>633</sup> CESCR, ‘General Comment No. 12: The Right to Adequate Food (Art.11) (1999) UN.Doc. E/C.12/1995/5’ (n 503) para 6; Eide, ‘The Right to an Adequate Standard of Living Including the Right to Food’ (n 518) 134; Cahill-Ripley and Skogly (n 19) 114; Just Fair (n 509) 82.

of charity with the realisation of the right to food concerning the process of ‘ensuring that all people have the capacity to feed themselves in dignity.’<sup>634</sup> Furthermore, the right to food is comprised of a number of different components. Namely, that food is adequate both as to quantity and quality; that food is sustainable; that the food allows for an appropriate diet; that the food is culturally acceptable; and that the food is accessible.<sup>635</sup>

Supply, and accessibility, have both economic and physical conceptions. In the economic sense, accessibility relates to the affordability of food which individuals should be able to afford to access to sustain ‘an adequate diet without compromising on any other basic needs.’<sup>636</sup> In combination with this, physically conceived, accessibility ‘means that food should be accessible to all, including to the vulnerable, such as children, the sick, disabled people or older persons, for whom it may be difficult to go out to get food.’<sup>637</sup>

Access, in relation to the right to food more generally, must be understood to include the concept of food security. That is all people at all times having ‘physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.’<sup>638</sup> Thus, at the core of food security is the notion of ‘stability of supply.’<sup>639</sup> Underpinning this is the concept of sustainable accessibility. That is the notion that adequate food must be accessible in both the short and the long term.<sup>640</sup>

Although enough food is available to fully realise the right to adequate food this food

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<sup>634</sup> Ziegler and others (n 579) 15.

<sup>635</sup> *ibid* 16–17.

<sup>636</sup> Just Fair (n 509) 84–85.

<sup>637</sup> *ibid*.

<sup>638</sup> Food and Agriculture Organization FAO, ‘Rome Declaration on Food Security and World Food Summit Plan of Action, 1996, Para 1’, <<http://www.fao.org/docrep/003/w3613e/w3613e00.htm>> accessed 31 January 2020; quoted in Just Fair (n 509) 81.

<sup>639</sup> Marks and Clapham (n 224) 169–170.

<sup>640</sup> Eide, ‘The Right to an Adequate Standard of Living Including the Right to Food’ (n 518) 134.

is ‘not allocated on the basis of need.’<sup>641</sup> As such those without sufficient quantities of food can be said to be suffering from a lack of access to food that is in fact available.<sup>642</sup> Therefore, the non-realisation of the right to adequate food is the result of accessibility in relation to food.<sup>643</sup> Lacking the resources to access food, which if but for lack of those resources to procure, would otherwise be available<sup>644</sup> may in some instances result in individuals experiencing starvation.<sup>645</sup> This starvation may in turn result in an inadequate dietary intake which may lead to malnutrition.

A distinction between hunger and starvation, that is insufficient supply of calories, and malnutrition, that is a lack of food providing sufficient calories, micronutrients, vitamins and minerals, must be drawn.<sup>646</sup> This is because an individual may have access to a sufficient supply of calories and thus be free from hunger whilst, at the very same time, have insufficient access to micronutrients, vitamins and minerals and thus be malnourished. This distinction supports the view that the right to food goes beyond, and should not be equated to, ‘a minimum package of calories, proteins and other specific nutrients.’<sup>647</sup> Such an interpretation is described by the CESCR as being ‘narrow or restrictive.’<sup>648</sup> This is because the right to food so conceived may address the problem of hunger whilst failing to address the issue of malnourishment. Thus, the right to food goes beyond merely having access to levels of calories or nutrients deemed necessary for subsistence.

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<sup>641</sup> Michael Haas, *International Human Rights: A Comprehensive Introduction* (Routledge 2008) 115.

<sup>642</sup> *ibid.*

<sup>643</sup> Bantekas and Oette (n 362) 439.

<sup>644</sup> Cahill-Ripley and Skogly (n 19) 117.

<sup>645</sup> Marks and Clapham (n 224) 167.

<sup>646</sup> Ziegler and others (n 579) 2.

<sup>647</sup> CESCR, ‘General Comment No. 12: The Right to Adequate Food (Art.11) (1999) UN.Doc. E/C.12/1995/5’ (n 503) para 6.

<sup>648</sup> *ibid.*

Ziegler *et al.* contend that there is an obligation to provide a minimum basic subsistence, that is to provide ‘a minimum essential level of economic, social and cultural rights, including the right to food.’<sup>649</sup> A consideration of the concept of malnutrition can aid in informing the determination of this standard. In human beings, malnutrition results when the process through which the human body uses food to maintain life, the normal functions associated with this, and growth, fails.<sup>650</sup> The immediate causes of this are insufficient realisation of the right to food and disease which are often linked as an insufficient diet, and thus insufficient realisation of the right to food, ‘can increase vulnerability to disease.’<sup>651</sup>

This demonstrates that chronic malnutrition can have damaging implications for the right to health which results in ‘prolonged impairment’<sup>652</sup> and can have lifelong consequences. In relation to children, malnutrition ‘inhibits mental and physical development.’<sup>653</sup> For example, undernourished children in India ‘are undersized, underweight, and likely to have IQs that are on average 10-15 points lower than those of well-nourished children.’<sup>654</sup> This places such children at a disadvantage from which they will never recover.<sup>655</sup> More generally, malnourishment can result in, *inter alia*, ‘underdevelopment of brain cells, heightened vulnerability to disease, including HIV/AIDS, physical deformities and blindness.’<sup>656</sup> It is therefore clear that the link between malnourishment and the right to health is one of crucial importance. This is amplified by the contention that in most deaths related to malnutrition,

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<sup>649</sup> Ziegler and others (n 579) 21.

<sup>650</sup> Kent (n 622) 7.

<sup>651</sup> *ibid* 9–10.

<sup>652</sup> Suresh C Babu *et al.*, *Food Security, Poverty and Nutrition Policy Analysis* (Second Edition, Elsevier 2014) 215.

<sup>653</sup> Kent (n 622) 15.

<sup>654</sup> Lester R Brown, *Full Planet, Empty Plates* (WW Norton & Company Ltd 2012) 8.

<sup>655</sup> Ziegler and others (n 579) 2.

<sup>656</sup> *ibid*.

malnutrition is not the primary cause of death but is instead ‘best understood as a risk factor’<sup>657</sup> which ‘weakens the human body and increases its susceptibility to disease.’<sup>658</sup>

Thus, as Cahill and Skogly contend, the concept of ‘adequate food,’ understood broadly, ‘should include the nutritional quality and quantity necessary to achieve a nutritious healthy state for all individuals.’<sup>659</sup> This is reiterated in the work of the UN Special Rapporteur on the Right to food, as quoted by Just Fair. Here the definition of the right to food includes not only access, but also includes the proviso that the food is both ‘quantitatively and qualitatively adequate and sufficient.’<sup>660</sup> Furthermore, the food must correspond to the consumers cultural traditions whilst also ensuring ‘a physical and mental, individual and collective, fulfilling and dignified life free of fear.’<sup>661</sup>

#### ***4.3.5. The Right to Water***

Although it is listed in various international conventions and documents,<sup>662</sup> the human right to water is not expressly codified in the international bill of rights.<sup>663</sup> This lack of reference to water contributed to the development of an international debate ‘about the existence of human rights obligations with respect to water and on the question of whether the human right to water is a self-standing right.’<sup>664</sup> This surprising lack of codification leads to one of two contrasting

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<sup>657</sup> Kent (n 622) 15.

<sup>658</sup> *ibid.*

<sup>659</sup> Cahill-Ripley and Skogly (n 19) 116.

<sup>660</sup> Just Fair (n 509) 82.

<sup>661</sup> *ibid.*

<sup>662</sup> Madeline Baer and Andrea Gerlak, ‘Implementing the Human Right to Water and Sanitation: A Study of Global and Local Discourses’ (2015) 36 *Third World Quarterly* 1527, 1528. see note 3 ‘These include the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the UN General Assembly Declaration on the Right to Development (1986), the Convention on the Rights of the Child (1989), and the African Charter on the Rights and Welfare of the Child (1990).’

<sup>663</sup> Cahill-Ripley (n 308) 25; Caiphaz Brewsters Soyapi, ‘Water Security and the Right to Water in Southern Africa: An Overview’ (2017) 20 *Potchefstroom Electronic Law Journal* 1, 6.

<sup>664</sup> Christina Leb, ‘The Right to Water in a Transboundary Context: Emergence of Seminal Trends’ (2012) 37 *Water International* 640, 642.

conclusions: ‘the omission could either be seen as the expression of a deliberate silence expressing the states’ (un- spoken) consensus that there should not be such a thing as a human right to water; or, alternatively, as a negligent silence meaning that the human right to water was simply forgotten at the time of drafting the two Covenants.’<sup>665</sup>

Given the cruciality of water to both the sustaining of human life as well as to the realisation of other rights,<sup>666</sup> I support the latter of these two conclusions. Although the reasons for this lack of codification are not clear, the view that the failure to expressly codify the right to water was negligent, as opposed to deliberate in nature, is supported by the agreement of most writers that such a right exists.<sup>667</sup> The discussion of water within this thesis, like Cullet’s analysis, accepts the premise that the right to water is ‘firmly anchored in international and national law’<sup>668</sup> and thus ‘moves beyond debates concerning either the existence or the legal status of the right in favour of a more in-depth discussion of its content.’<sup>669</sup>

The right to water is explicitly recognised within the CEDAW and the CRC.<sup>670</sup> This recognition has however been framed within the context of other rights. In relation to women in rural areas, Article 14(2)h of the CEDAW requires states parties to ensure the right to water

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<sup>665</sup> Pierre Thielbörger, ‘Re-Conceptualizing the Human Right to Water: A Pledge for a Hybrid Approach’ (2015) 15 Human Rights Law Review 225, 227.

<sup>666</sup> Pilar Carolina Villar, ‘Groundwater and the Right to Water in a Context of Crisis’ (2016) 19 Ambiente & Sociedade 85, 88; Salman MA Salman and Siobhan McInerney-Lankford, *The Human Right to Water* (The World Bank 2004) 53–54; Lucero Radonic, ‘Through the Aqueduct and the Courts: An Analysis of the Human Right to Water and Indigenous Water Rights in Northwestern Mexico’ (2017) 84 Geoforum 151, 151; Amanda Cahill-Ripley, ‘The Human Right to Water – A Right of Unique Status’: The Legal Status and Normative Content of the Right to Water’ (2005) 9 The International Journal of Human Rights 389, 390–391; Cahill-Ripley (n 308) 2–3.

<sup>667</sup> Thielbörger (n 665) 228.

<sup>668</sup> Phillipe Cullet, ‘Right to Water in India – Plugging Conceptual and Practical Gaps’ (2013) 17 The International Journal of Human Rights 56, 56.

<sup>669</sup> *ibid.*

<sup>670</sup> Cahill-Ripley (n 308) 22; Inga T Winkler, *Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart Publishing 2012) 78.

supply in relation to adequate living conditions.<sup>671</sup> Additionally, the CRC contains water as a part of its provisions in relation to the right to health.<sup>672</sup> Therefore, although a right to water has been recognised in these documents this has been in relation to other rights as opposed to as a freestanding right.

As such, although recognised before the CESCR's General Comment 15, a free-standing right to water 'has been explicitly proclaimed only since 2002 when the UN Committee on Economic, Social and Cultural Rights (CESCR) officially adopted General Comment 15.'<sup>673</sup> This General Comment, for the first time, defined and individualised 'the human right to water as a stand-alone right,'<sup>674</sup> and put forward 'the first comprehensive definition of the human right to water.'<sup>675</sup> That is not to state, however, that this General Comment created a 'new' human right.<sup>676</sup> Instead, General Comment 15 extrapolated 'the nature of their existing obligations'<sup>677</sup> and inferred the right to water from Articles 11 and 12 of the ICESCR.<sup>678</sup> Pertaining to Article 11, this inference was drawn partly on account of the use of the word 'including' which was evidenced as demonstrating the non-exhaustive nature of the elements of an Adequate Standard of Living listed within the Article.<sup>679</sup> In relation to Article

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<sup>671</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979 para 14 (2) h.

<sup>672</sup> CRC (n 514) para 24 (c).

<sup>673</sup> Richard P Hiskes, 'Missing the Green: Golf Course Ecology, Environmental Justice, and Local Fulfillment of the Human Right to Water' (2010) 32 Human Rights Quarterly 326, 329.

<sup>674</sup> Jimena Murillo Chavarro, *The Human Right to Water: A Legal Comparative Perspective at the International, Regional and Domestic Level* (Intersentia 2015) 18.

<sup>675</sup> Radonic (n 666) 151.

<sup>676</sup> Benjamin Mason Meier and Yuna Kim, 'Human Rights Accountability through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation' (2015) 26 Duke Journal of Comparative & International Law 139, 162.

<sup>677</sup> Salman and McInerney-Lankford (n 666) 5.

<sup>678</sup> Malgosia Fitzmaurice, 'The Human Right to Water' (2007) 18 Fordham Environmental Law Review 537, 548; Meier and Kim (n 676) 162.

<sup>679</sup> Salman and McInerney-Lankford (n 666) 56; El Hadji Guisse, 'Final Report of the Special Rapporteur: Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the



12, the General Comment held that the right to water ‘is inextricably linked to the right to the highest attainable standard of physical and mental health.’<sup>680</sup> In recent years the right to water has gained the status of ‘an independent human right.’<sup>681</sup> Therefore, the human right to water was implicitly provided for within the ICESCR<sup>682</sup> which provides ‘the basis for the recognition of the right.’<sup>683</sup>

More so, the right to water has received ‘high-profile declarative support’<sup>684</sup> and been made official by the UNGA ‘Resolution A/RES/64/292 in September of 2010’<sup>685</sup> which was followed later that year by a Human Rights Council Resolution A/HRC/RES/15/9.<sup>686</sup> Since these resolutions UN member states have been legally obligated to working towards the realisation of the right to water for their citizens.<sup>687</sup> Resolution A/RES/64/292 recognised, as opposed to created, the right to water and this demonstrates that the UNGA were of the view that the right had always existed.<sup>688</sup> It is clear, therefore, that General Comment Number 15 has been ‘buttressed’<sup>689</sup> by other elements of the UN human rights system and that this has

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Realization of the Right to Drinking Water Supply and Sanitation (2004) UN.Doc. E/CN.4/Sub.2/2004/20’ para 24; Catarina de Albuquerque and Inga T Winkler, ‘Neither Friend nor Foe: Why the Commercialization of Water and Sanitation Services Is Not the Main Issue in the Realization of Human Rights’ (2010) 17 *Brown Journal of World Affairs* 167, 171.

<sup>680</sup> Cristy Clark, ‘Of What Use Is a Deradicalized Human Right to Water?’ (2017) 17 *Human Rights Law Review* 231, 243.

<sup>681</sup> Cahill-Ripley and Skogly (n 19) 120.

<sup>682</sup> Cahill-Ripley (n 308) 15.

<sup>683</sup> Salman and McInerney-Lankford (n 666) 5.

<sup>684</sup> Owen McIntyre, ‘The Human Right to Water as a Creature of Global Administrative Law’ (2012) 37 *Water International* 654, 660.

<sup>685</sup> Larissa Helena Ferreira Varela, ‘Challenges to The Human Right to Water and To the Sustainability of Services in Santa Cruz, Cabo Verde’ (2016) 19 *Ambiente & Sociedade* 207, 210.

<sup>686</sup> Lucy Rodina, ‘Human Right to Water in Khayelitsha, South Africa – Lessons from a “Lived Experiences” Perspective’ (2016) 72 *Geoforum* 58, 60.

<sup>687</sup> Veronica Perera, ‘Engaged Universals and Community Economies: The (Human) Right to Water in Colombia’ (2015) 47 *Antipode* 197, 198.

<sup>688</sup> Winkler (n 670) 78.

<sup>689</sup> Meier and Kim (n 676) 161.

contributed to the right to water developing from being implicit in nature to being an ‘explicit obligation, and, finally, to independent right.’<sup>690</sup>

The right to water does not entail an unlimited amount of water<sup>691</sup> and ‘it remains unclear precisely what legal obligations arise from it.’<sup>692</sup> The right does however entitle everyone to, for personal and domestic uses,<sup>693</sup> clean<sup>694</sup> ‘sufficient, safe, acceptable, physically accessible and affordable water.’<sup>695</sup>

The right to water prioritises ‘the provision of safe and clean water for drinking, sanitation, hygiene, and other domestic activities.’<sup>696</sup> These purposes are linked to having enough water to survive and enough water to be clean in an environment free from human waste. This echoes the view that the 2010 resolutions of the UNGA and HRC prioritise ‘water for life.’<sup>697</sup> The notion of part of the content of the right to water being water for life must necessarily consider the notion of basic needs. Clark highlights that the 1977 UN Conference on Water in Mar del Plata linked both the quantity and quality of the content of the right to water to being ‘equal to their basic needs.’<sup>698</sup> This was reaffirmed, according to Gleick, by the 1986 UN Right to Development as well as the 1992 Earth Summit in Rio de Janeiro.<sup>699</sup> In 2004

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<sup>690</sup> *ibid* 160.

<sup>691</sup> Erik Gawel and Wolfgang Bretschneider, ‘Specification of a Human Right to Water: A Sustainability Assessment of Access Hurdles’ (2017) 42 *Water International* 505, 507; Peter H Gleick, ‘The Human Right to Water’ (1998) 1 *Water Policy* 487, 494–495; Cahill-Ripley (n 308) 26.

<sup>692</sup> A Belinskij and LJ Kotzé, ‘Obligations Arising from the Right to Water in Finland and South Africa’ (2016) 6 *Aquatic Procedia* 30, 31.

<sup>693</sup> Winkler (n 670) 130.

<sup>694</sup> Amber Wutich et al., ‘Can Informal Water Vendors Deliver on the Promise of a Human Right to Water? Results from Cochabamba, Bolivia’ (2016) 79 *World Development* 14, 14.

<sup>695</sup> United Nations Development Programme UNDP, *Human Development Report 2006. Beyond Scarcity: Power, Poverty and the Global Water Crisis* (Palgrave Macmillan 2006) 9.

<sup>696</sup> Ralph P Hall et al., ‘The Human Right to Water: The Importance of Domestic and Productive Water Rights’ (2014) 20 *Science and Engineering Ethics* 849, 850.

<sup>697</sup> Baer and Gerlak (n 662) 1529.

<sup>698</sup> Clark (n 680) 242.

<sup>699</sup> Gleick (n 691) 495.

the Special Rapporteur on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, Guisse, stated that the ‘right to drinking water is the right of every individual to have access to the amount of water required to meet his or her basic needs.’<sup>700</sup> Guisse further this by specifying that basic needs ‘have been defined in General Comment No. 15 to include ‘personal and domestic uses.’<sup>701</sup>

In relation to water, the idea of basic needs has been twinned with the guaranteeing of human dignity suggesting that the standard required to meet basic needs forms the core content of the right to water.<sup>702</sup> Gleick defines and quantifies the basic water requirements (equivalent to basic needs) ‘in terms of quantity and quality for four basic human needs: drinking water for survival, water for human hygiene, water for sanitation services, and modest household needs for preparing food.’<sup>703</sup> Based on this, Gleick suggested that the conclusion could be drawn ‘that a human right to water should only apply to ‘basic needs’ for drinking, cooking and fundamental domestic uses.’<sup>704</sup> This will be explored in further detail when addressing the concepts of adequacy and quality below.

General Comment No. 15 utilises adequacy and quality as part of an AAAAQ indicator framework in relation to the right to water.<sup>705</sup> This framework focuses on availability, accessibility, acceptability, affordability derived from economic accessibility and quality.<sup>706</sup> These five indicators represent ‘the parameters to be met in the access to water for personal

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<sup>700</sup> Guisse (n 679) para 33.

<sup>701</sup> *ibid.*

<sup>702</sup> Cahill-Ripley (n 308) 44; Winkler (n 670) 278.

<sup>703</sup> Peter H Gleick, ‘Basic Water Requirements for Human Activities: Meeting Basic Needs’ (1996) 21 *Water International* 83, 83.

<sup>704</sup> Gleick (n 691) 495.

<sup>705</sup> Meier and Kim (n 676) 195.

<sup>706</sup> *ibid.*; Benjamin Meier et al., ‘Translating the Human Right to Water and Sanitation into Public Policy Reform’ (2014) 20 *Science and Engineering Ethics* 833, 835.

and domestic uses'<sup>707</sup> and form the normative content of the right to water.<sup>708</sup> The different elements of this normative content have a core content 'and correlative core obligations that must be realized immediately.'<sup>709</sup> In providing the essential components of the right, this core content is 'especially relevant to realizing the right in the context of the poor.'<sup>710</sup>

The 'human rights framework refrains from providing a global, absolute value to define 'sufficient quantity.'"<sup>711</sup> This is despite the fact that volumetric quantities can be ascertained in relation to the right to water, the CESCR believes that a measurement of such quantities alone is not enough to adjudge realisation of the right.<sup>712</sup> Even so Paragraph 12 (a) of General Comment No. 15 the CESCR holds that 'each individual should have access to a quantity of water corresponding to the guidelines of the World Health Organisation.'<sup>713</sup> This setting of adequacy of quantity to WHO guidelines accounts for changes to the standard.<sup>714</sup> Bos et al. highlight that a 2003 study by the World Health Organisation (WHO) 'presents quantities based on levels of service and linked to levels of public health concern'<sup>715</sup> from which an indication of a range of values may be derived. Chavarro highlights that the WHO has determined that, beyond basic needs alone and in order to prevent health concerns arising as a consequence of lack of water, somewhere between 50-100 l/p/d seems 'to be sufficient to satisfy most basic hygienic and consumption needs.'<sup>716</sup> Yet, this figure goes beyond basic needs.

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<sup>707</sup> M Belen Olmos Giupponi and Martha C Paz, 'The Implementation of the Human Right to Water in Argentina and Colombia' (2015) 15 *Anuario Mexicano de Derecho Internacional* 323, 327.

<sup>708</sup> de Albuquerque and Winkler (n 679) 172.

<sup>709</sup> Cahill-Ripley and Skogly (n 19) 121.

<sup>710</sup> *ibid.*

<sup>711</sup> Robert Bos et al., *Manual on The Human Rights to Safe Drinking Water and Sanitation for Practitioners* (IWA Publishing 2016) 16.

<sup>712</sup> Bantekas and Oette (n 362) 433.

<sup>713</sup> Fitzmaurice (n 678) 749.

<sup>714</sup> Cahill-Ripley (n 308) 27.

<sup>715</sup> Bos et al. (n 711) 16.

<sup>716</sup> Chavarro (n 674) 21.

Although 3±5 litres per person per day (l/p/d) of water is ‘the amount needed to maintain human survival’<sup>717</sup> setting such a threshold for realisation of the core content of the accessibility strand of the right to water would prioritise drinking/survival water over other uses. This neglects the fact that water is required in order to realise other rights such as the right to food and the right to an adequate standard of living.<sup>718</sup> Concerning basic needs in relation to water alone, Winkler suggests that the WHO refers to 20-25 l/p/d<sup>719</sup> as a minimum. This can be supported in considering the South African Constitutional Court’s determination that the necessary quantity is 25 l/p/d<sup>720</sup> and Chavarro contends that this figure ‘represents the lowest level to maintain life.’<sup>721</sup> This is consistent with Gleick’s recommendation that individuals have access to 25 l/p/d of clean water.<sup>722</sup> Beyond this, the UNDP has described 20 l/p/d as ‘a minimum requirement for respecting the right to water—and a minimum target for governments.’<sup>723</sup> This demonstrates that the obligations arising in relation to water adequacy under the right to water require more than simply a quantity of water sufficient to prevent death by dehydration.

The concept of accessibility is also sub-divided. According to the CESCR’s General Comment No. 15, it comprised of ‘four overlapping dimensions.’<sup>724</sup> These dimensions are

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<sup>717</sup> Gleick (n 691) 496.

<sup>718</sup> Guisse (n 679) para 45.

<sup>719</sup> Winkler (n 670) 132.

<sup>720</sup> Giupponi and Paz (n 707) 329–330.

<sup>721</sup> Chavarro (n 674) 21.

<sup>722</sup> Gleick (n 703) 87.

<sup>723</sup> UNDP, *Human Development Report 2006. Beyond Scarcity: Power, Poverty and the Global Water Crisis* (n 695) 4.

<sup>724</sup> CESCR, ‘General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002) UN.Doc. E/C.12/2002/11’ (n 504) para 12 (c).

‘physical accessibility,’<sup>725</sup> ‘economic accessibility,’<sup>726</sup> ‘non-discrimination,’<sup>727</sup> and ‘information accessibility.’<sup>728</sup> Physical accessibility relates to the ability of individuals to obtain water with there being a need for water to ‘be provided in the household or its immediate surroundings.’<sup>729</sup> Consequently, General Comment No. 15 requires that water ‘be within safe physical reach for all sections of the population.’<sup>730</sup> This requirement is justified given that, possibly due to the risk of bacterial infections and diarrheal disease increasing in correlation with increasing distances from water sources, water waste and issues with being underweight ‘increase as the distance to the protected water sources increases.’<sup>731</sup> Safe and clean drinking water must also ‘be available for household use, in public buildings and at the workplace.’<sup>732</sup> Supply must also be reliable.<sup>733</sup> Economic accessibility pertains to affordability<sup>734</sup> and requires that individuals are not excluded from access to water due to financial constraints. General Comment No. 15 highlights that not only must the direct costs and charges associated with securing water be affordable but that indirect costs and charges must also be affordable.<sup>735</sup> Additionally, both direct and indirect costs ‘must not compromise or threaten the realization of other Covenant rights.’<sup>736</sup> In terms of information accessibility ‘accessibility includes the right to seek, receive

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<sup>725</sup> *ibid* 12 (c) i.

<sup>726</sup> *ibid* 12 (c) ii.

<sup>727</sup> *ibid* 12 (c) iii.

<sup>728</sup> *ibid* 12 (c) iv.

<sup>729</sup> Winkler (n 670) 136.

<sup>730</sup> CESCR, ‘General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002) UN.Doc. E/C.12/2002/11’ (n 504) para 12 (c) i.

<sup>731</sup> Babu et al. (n 652) 232.

<sup>732</sup> Bos et al. (n 711) 16.

<sup>733</sup> *ibid*.

<sup>734</sup> Winkler (n 670) 137.

<sup>735</sup> CESCR, ‘General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002) UN.Doc. E/C.12/2002/11’ (n 504) para 12 (c) i.

<sup>736</sup> *ibid* 12 (c) ii.

and impart information concerning water issues.’<sup>737</sup>

#### **4.3.6. The Right to Sanitation**

The CESCR’s General Comments have not addressed sanitation on its own<sup>738</sup> and the ICESCR contains no specific reference to the right to sanitation.<sup>739</sup> Despite the lack of a General Comment on the right to sanitation, the CESCR ‘has issued a formal statement recognizing that similar obligations apply, following an approach taken by the Special Rapporteur in her 2009 report to the Council.’<sup>740</sup> In this statement the CESCR stressed that ‘being fully aware of the relevance of sanitation for the enjoyment of an’ adequate standard of living it had ‘regularly raised the issue of sanitation in its dialogue with States Parties and made specific reference to it in several of its General Comments.’<sup>741</sup> Additionally, de Albuquerque contends that the rights to life, health, housing, a healthy environment and freedom from inhumane and degrading treatment are frequently relied upon in the ‘case law dealing with water and sanitation.’<sup>742</sup>

Furthermore, another use of water is for sanitation and these two concepts are often conceptualised together<sup>743</sup> with Kamga highlighting that the use of water for sanitation is laid down by General Comment 15 as a determinant of water sufficiency.<sup>744</sup> However, alternative methods of sanitation provision exist which require no water<sup>745</sup> and strictly coupling the right

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<sup>737</sup> *ibid* 12 (c) iv.

<sup>738</sup> Keri Ellis and Loretta Feris, ‘The Right to Sanitation: Time to Delink from the Right to Water’ (2014) 36 *Human Rights Quarterly* 607, 616.

<sup>739</sup> Loretta Feris, ‘The Human Right to Sanitation: A Critique on the Absence of Environmental Considerations’ (2015) 24 *Review of European Community & Environmental Law* 6, 19.

<sup>740</sup> Catarina de Albuquerque, ‘Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Common Violations of the Human Rights to Water and Sanitation (2014) UN.Doc. A/HRC/27/55’ para 16.

<sup>741</sup> Committee on Economic and Social Rights CESCR, ‘Statement on the Right to Sanitation (2010) UN.Doc. E/C.12/2010/1’ para 6.

<sup>742</sup> de Albuquerque (n 740) para 6.

<sup>743</sup> Ellis and Feris (n 738) 608.

<sup>744</sup> Kamga (n 313) 618.

<sup>745</sup> Gleick (n 703) 85.

to water with the right to sanitation would exclude these alternative methods which ‘are being promoted and encouraged.’<sup>746</sup> This is because such a coupling places the emphasis on the right to water over the right to sanitation<sup>747</sup> and, if the right to sanitation were interpreted in such a way, non-water-based sanitation provision would fall outside the scope of the right.<sup>748</sup> Further, such an interpretation regards the right to sanitation as ‘the right to water for sanitation purposes’<sup>749</sup> which is too limited to be of use in many contexts.<sup>750</sup>

Even despite this, the right to sanitation has continued to be conceptualised alongside the right to water<sup>751</sup> with the current international legal system perpetuating ‘the strong historical linkage between sanitation and water.’<sup>752</sup> This is evidenced semantically through the use of the phrase ‘the *right* to safe and clean drinking water and sanitation.’<sup>753</sup> Here the use of the singular ‘right’ as opposed to plural ‘rights’ suggests that the right that exists is a singular right to ‘water and sanitation’ as opposed to the case being that the right to water and the right to sanitation exist separately.

However, in contrast to this, some do refer to the right to water and the right to sanitation as separate rights.<sup>754</sup> In her 2009 report, de Albuquerque noted the ongoing discussion in regard to sanitation as a distinct right, which a trend towards recognising was highlighted as existing.<sup>755</sup> Despite the ongoing nature of this discussion,<sup>756</sup> as independent expert, de

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<sup>746</sup> CESCR, ‘Statement on the Right to Sanitation (2010) UN.Doc. E/C.12/2010/1’ (n 741) para 7.

<sup>747</sup> Pedi Obani and Joyeeta Gupta, ‘The Evolution of the Right to Water and Sanitation: Differentiating the Implications’ (2015) 24 Review of European Community & Environmental Law 27, 35.

<sup>748</sup> Ellis and Feris (n 738) 627.

<sup>749</sup> *ibid.*

<sup>750</sup> *ibid.*

<sup>751</sup> *ibid* 608.

<sup>752</sup> *ibid* 615.

<sup>753</sup> Guisse (n 679) para 24; see also Baer and Gerlak (n 662) 1527.

<sup>754</sup> Meier et al. (n 706) 835; Meier and Kim (n 676) 160.

<sup>755</sup> de Albuquerque (n 617) para 59.

<sup>756</sup> *ibid* 81.



Albuquerque supported and encouraged this trend based upon the conviction ‘that there are unique aspects to sanitation that evoke the inherent dignity of all human beings and which make it impossible to address satisfactorily through other human rights.’<sup>757</sup>

Dignity can be said to pervade ‘the issue of sanitation’<sup>758</sup> with the CESCR reaffirming that sanitation is fundamental ‘for leading a life in dignity.’<sup>759</sup> This is due to the fact that ‘personal sanitation is still a highly sensitive issue’<sup>760</sup> meaning that it is surrounded by taboo and is for most ‘a highly private matter and an uncomfortable topic for public discussion.’<sup>761</sup> This is due to the ‘vulnerability and shame that so many people experience every day when, again, they are forced to defecate in the open, in a bucket or a plastic bag’<sup>762</sup> with the indignity of the situation causing embarrassment.<sup>763</sup> On top of this, it is difficult to maintain self-respect, which is closely linked to dignity, ‘when being forced to squat down in the open, with no respect for privacy, not having the opportunity to clean oneself after defecating and facing the constant threat of assault in such a vulnerable moment.’<sup>764</sup> This is the situation that those lacking access to adequate sanitation face.

The notion of sanitation as being distinct has been echoed by the CESCR in regard to the relationship between water and sanitation in the recognition ‘that sanitation has distinct features which warrant its separate treatment from water in some respects.’<sup>765</sup> Regardless of whether one accepts the argument that the right to sanitation should be considered as distinct

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<sup>757</sup> *ibid* 59.

<sup>758</sup> *ibid* 58.

<sup>759</sup> CESCR, ‘Statement on the Right to Sanitation (2010) UN.Doc. E/C.12/2010/1’ (n 741) para 7.

<sup>760</sup> de Albuquerque (n 617) para 80.

<sup>761</sup> *ibid* 7.

<sup>762</sup> *ibid* 55.

<sup>763</sup> *ibid*.

<sup>764</sup> *ibid* 57.

<sup>765</sup> CESCR, ‘Statement on the Right to Sanitation (2010) UN.Doc. E/C.12/2010/1’ (n 741) para 7.

from the right to water, ‘it is indisputable that there are human rights obligations related to access to sanitation, because sanitation is inextricably linked to the enjoyment of so many other human rights.’<sup>766</sup> Thus, a right to sanitation has been recognised<sup>767</sup> and is identifiable within international human rights law.<sup>768</sup>

Several international binding instruments provide for the right to basic sanitation.<sup>769</sup> States have consistently recognised that the right to an adequate standard of living includes sanitation<sup>770</sup> and the right to sanitation has evolved under the UN’s human rights system into ‘an explicit obligation.’<sup>771</sup> This is because protection of the right to sanitation ‘can be said to be a necessary implication of a range of fundamental rights.’<sup>772</sup> For example, sanitation affects health<sup>773</sup> and consequently, amongst other rights, the right to Health is ‘integrally related’<sup>774</sup> to includes sanitation.<sup>775</sup> Further, a direct consequence of a lack of sanitation facilities is that ‘diarrhoea is the second biggest cause of death of children under the age of five.’<sup>776</sup> Research suggests ‘that poor sanitation may be linked to as much as a quarter of all under-five deaths’<sup>777</sup> and the WHO estimates ‘that 88 per cent of diarrhoeal disease is caused by unsafe water and

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<sup>766</sup> de Albuquerque (n 617) para 60.

<sup>767</sup> Gordon McGranahan, ‘Realizing the Right to Sanitation in Deprived Urban Communities: Meeting the Challenges of Collective Action, Coproduction, Affordability, and Housing Tenure’ (2015) 68 World Development 242, 242.

<sup>768</sup> Guisse (n 679) para 44.

<sup>769</sup> Kamga (n 313) 618. Kamga cites the CEDAW, the CRC and two Geneva Conventions; see the CEDAW Article 14(1)h; the CRC Article 24(2); the Geneva Convention III (1949) – treatment of prisoners of war Article 29; the Geneva Convention IV (1949) dealing with the protection of civilian persons in times of war Article 36, Article 85, and Article 124

<sup>770</sup> *ibid* 617.

<sup>771</sup> Meier et al. (n 706) 835.

<sup>772</sup> Kamga (n 313) 650.

<sup>773</sup> Feris (n 739) 18.

<sup>774</sup> CESCR, ‘Statement on the Right to Sanitation (2010) UN.Doc. E/C.12/2010/1’ (n 741) para 7.

<sup>775</sup> Kamga (n 313) 640.

<sup>776</sup> CESCR, ‘Statement on the Right to Sanitation (2010) UN.Doc. E/C.12/2010/1’ (n 741) para 4.

<sup>777</sup> de Albuquerque (n 617) para 4.

sanitation.’<sup>778</sup> Additionally, beyond the individual level, sanitation has an ‘important public health dimension’<sup>779</sup> in that it can ensure that ‘the environment in which they live is not contaminated with faeces.’<sup>780</sup> Access to adequate sanitation therefore protects the health of not only the individual accessing it but also others.

Despite this, the right to sanitation lacks ‘robust technical definitions in international law’<sup>781</sup> but is ‘commonly understood as the right of everyone to have access to adequate, safe sanitation that upholds the dignity of the user and is conducive to the protection of the environment and public health.’<sup>782</sup> Additionally, the right to sanitation must be realised both at the individual and the collective level as ‘the full protection of the health of the individual requires protection of the environment from human waste and this can only be done if everyone has, and utilizes, adequate sanitation.’<sup>783</sup> Together this suggests that the right to sanitation entails access to adequate sanitation and adequacy entails availability, quality and accessibility.<sup>784</sup> Further, the sanitation facilities provided under such a system must be culturally acceptable<sup>785</sup> and relating to quality these facilities must also ‘be hygienically and technically safe to use, and must include hygiene promotion and education.’<sup>786</sup> Combined with the UN Independent Experts report, it is therefore clear that the human right to sanitation has an

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<sup>778</sup> *ibid* 23.

<sup>779</sup> Heller (n 405) para 6.

<sup>780</sup> *ibid*.

<sup>781</sup> Bos et al. (n 711) 23.

<sup>782</sup> *ibid*.

<sup>783</sup> Guisse (n 679) para 44.

<sup>784</sup> Ricard Giné-Garriga et al., ‘Monitoring Sanitation and Hygiene in the 2030 Agenda for Sustainable Development: A Review through the Lens of Human Rights’ (2017) 580 *Science of the Total Environment* 1108, 1115.

<sup>785</sup> Feris (n 739) 20.

<sup>786</sup> *ibid*.

AAAAQ framework.<sup>787</sup> Thus, sanitation facilities and services must be available, accessible, affordable, acceptable and of sufficient quality. They must also be safe.<sup>788</sup>

Building on this, sanitation can be defined as a system of collecting, transporting, treating, disposing or reusing ‘human excreta, and associated hygiene.’<sup>789</sup> This was the definition proposed by the independent expert in her 2009 report<sup>790</sup> which was later endorsed by the CESCR.<sup>791</sup> The term ‘‘basic sanitation’ is also used, which is defined as the disposal of human excreta to prevent disease and safeguard privacy and dignity.’<sup>792</sup> The WHO gives ‘garbage collection and wastewater disposal’ as examples of this.<sup>793</sup> Consequently, the right to sanitation is the right to a system fulfilling these purposes. Such a system, and as such sanitation facilities, ‘must effectively prevent human and animal, including insect, contact with human excreta to avert the spread of disease.’<sup>794</sup>

Even so, the state is under no obligation to provide sanitation facilities free of charge except ‘when people are genuinely unable to pay for sanitation.’<sup>795</sup> This is because free unlimited and universal access to water and sanitation ‘could actually harm low-income households by depriving governments and service providers of the revenue needed to expand and maintain the service.’<sup>796</sup> However, and of great relevance to this thesis given the conception of destitution as an extreme form of poverty, the state is obliged to provide sanitation services,

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<sup>787</sup> de Albuquerque (n 617) paras 69–80 These paragraphs address availability, accessibility, affordability, acceptability and quality.

<sup>788</sup> Heller (n 405) para 5.

<sup>789</sup> Feris (n 739) 18.

<sup>790</sup> de Albuquerque (n 617) para 63.

<sup>791</sup> CESCR, ‘Statement on the Right to Sanitation (2010) UN.Doc. E/C.12/2010/1’ (n 741) para 8.

<sup>792</sup> de Albuquerque (n 617) para 9.

<sup>793</sup> Kamga (n 313) 616.

<sup>794</sup> Heller (n 405) para 11.

<sup>795</sup> de Albuquerque (n 617) para 67.

<sup>796</sup> Heller (n 405) para 6.

‘free of charge,’<sup>797</sup> in certain conditions ‘such as extreme poverty or natural disasters, when people, for reasons beyond their control, are genuinely unable to access sanitation through their own means.’<sup>798</sup> In such circumstances, perhaps when individuals face an inability to pay, ‘the human rights framework indeed requires free services that must be financed through sources other than user contributions.’<sup>799</sup> States must look towards means of financing such provision beyond user contributions and mechanisms such as, *inter alia*, taxation, transfers and cross-subsidisation could form part of ‘a broader system for financing water and sanitation services.’<sup>800</sup> This will therefore require an investment by State Parties. However, investing in sanitation can return positive yields with the CESCR citing research, which was recent in 2010, as estimating that ‘for every dollar invested in sanitation, there is about a nine-dollar long-term benefit in costs averted and productivity gained.’<sup>801</sup>

In regard to availability the right to sanitation requires that there be sufficient sanitation facilities ‘within, or in the immediate vicinity, of each household, health or educational institution, public institutions and places, and the workplace.’<sup>802</sup> Thus ‘sanitation facilities must be physically accessible for everyone at all times of day and night.’<sup>803</sup> An element of this physical accessibility is that the facilities be securely located<sup>804</sup> as to ‘ensure minimal risks to

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<sup>797</sup> *ibid* 12.

<sup>798</sup> de Albuquerque (n 617) para 67.

<sup>799</sup> Heller (n 405) para 7.

<sup>800</sup> *ibid*.

<sup>801</sup> CESCR, ‘Statement on the Right to Sanitation (2010) UN.Doc. E/C.12/2010/1’ (n 741) para 5.

<sup>802</sup> United Nations Office to support the International Decade for Action, ‘Water for Life: 2005-2015 The Human Right to Water and Sanitation: Media Brief’ 7 <[http://www.un.org/waterforlifedecade/pdf/human\\_right\\_to\\_water\\_and\\_sanitation\\_media\\_brief.pdf](http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf)> accessed 5 June 2018; see also Feris (n 739) 20.

<sup>803</sup> Giné-Garriga et al. (n 784) 1113.

<sup>804</sup> Nandita Singh, ‘Translating Human Right to Water and Sanitation into Reality: A Practical Framework for Analysis’ (2013) 15 Water Policy 943, 944.

the physical security of users’<sup>805</sup> in order to prevent the physical security of those accessing the facilities from being threatened.<sup>806</sup>

Beyond accessibility in the physical sense, sanitation facilities must be economically accessible. Thus, they must be affordable. Affordability is a ‘highly contextual’<sup>807</sup> concept and as such standards of affordability must be determined relatively as opposed to universally. Even so, sanitation may be regarded as affordable if accessing it does not ‘compromise the ability to pay for other essential necessities.’<sup>808</sup> More generally ‘a sanitation system is affordable to an individual or institution if they have the necessary financial or other resources with which to acquire it, and do not have higher priority uses for these resources.’<sup>809</sup> In many circumstances, the reason for water and sanitation services being disconnected is a failure to pay and this suggests that ‘the affordability of water and sanitation services and disconnections are inextricably linked.’<sup>810</sup> Such disconnections are, however, ‘only permissible if it can be shown that households are able to pay but are not paying.’<sup>811</sup> Based upon paragraph 44(a) of the CESCR’s General Comment no. 15,<sup>812</sup> Heller interprets disconnections for an inability, as opposed to unwillingness, to pay as a retrogressive measure constituting ‘a violation of the human rights to water and sanitation.’<sup>813</sup>

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<sup>805</sup> Giné-Garriga et al. (n 784) 1113.

<sup>806</sup> Feris (n 739) 20.

<sup>807</sup> Heller (n 405) para 28.

<sup>808</sup> Feris (n 739) 20; Heller (n 405) where the rights to food, housing, health, clothing and education are listed, *inter alia*, as such necessities.

<sup>809</sup> McGranahan (n 767) 247.

<sup>810</sup> Heller (n 405) para 32.

<sup>811</sup> *ibid* 33.

<sup>812</sup> CESCR, ‘General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002) UN.Doc. E/C.12/2002/11’ (n 504) ‘Violations of the obligation to respect follow from the State party’s interference with the right to water. This includes, *inter alia*: (i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water’.

<sup>813</sup> Heller (n 405) para 33.

#### ***4.3.7. The Right to Social Security***

The right to social security is an ‘economic and social necessity for development and progress’<sup>814</sup> which broadly pools social risk ‘to pursue the common good of all’<sup>815</sup> and ASL has been clearly linked to social security. This is because the CESCR has held that social security benefits must be adequate in amount and duration in order that everyone may realise their right to an adequate standard of living.<sup>816</sup> In this sense, ‘the drafters of the UDHR considered social security to be one of the core guarantees for the right of everyone to an adequate standard of living.’<sup>817</sup> Evidencing this notion, the CESCR has found benefit cuts to have negatively impacted the enjoyment of the right to social security and the right to an ASL.<sup>818</sup> In relation to destitution specifically, the right to social security is pertinent given the finding that in modern welfare states certain groups can face destitution for reasons related to social security in the form of adequacy and access.<sup>819</sup>

The right ‘has been strongly affirmed in international law.’<sup>820</sup> The 2012 International Labor Organisation (ILO) Recommendation 202 relating to social protection links Articles 22 and 25 of the UDHR and Articles 9, 11 and 12 of the ICESCR to the right to social security.<sup>821</sup> Guidance regarding the implementation of this right has been described by Chapman as the

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<sup>814</sup> International Labour Organization ILO, ‘Social Protection Floors Recommendation: Recommendation 202, Geneva, 101st ILC Session (14 Jun 2012)’ preamble.

<sup>815</sup> Virginia P Reno, ‘How Social Security Works’ (2005) 29 *Generations* 23, 23.

<sup>816</sup> CESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9) (2007) UN.Doc. E/C.12/GC/19’ (n 504) para 22.

<sup>817</sup> Eide, ‘Adequate Standard of Living’ (n 114) 201.

<sup>818</sup> CESCR, ‘Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ (2016) E/C.12/GBR/CO/6’ (n 613) para 40.

<sup>819</sup> Fitzpatrick et al. (n 2) 71.

<sup>820</sup> CESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9) (2007) UN.Doc. E/C.12/GC/19’ (n 504) para 6.

<sup>821</sup> ILO, ‘Social Protection Floors Recommendation: Recommendation 202, Geneva, 101st ILC Session (14 Jun 2012)’ (n 814) preamble.

‘unique task’<sup>822</sup> of the International Labour Organisation (ILO) and defining the right to social security has also fallen to this agency.<sup>823</sup> ILO Convention 102<sup>824</sup> on Social Security (Minimum Standards) establishes, as the name suggests, ‘worldwide-agreed minimum standards for all nine branches of social security’<sup>825</sup> and as such its significance cannot be undervalued.

Building on this, the right to social security has been affirmed at the regional level. In the European context, the primary instrument enshrining the right to social security is the European Social Charter (Revised),<sup>826</sup> henceforth Revised Charter, of which Articles 12, 13 and 14 recognise the right. Further still, Article 30 of the Revised Charter ‘stipulates the right to protection against poverty and social exclusion.’<sup>827</sup> Article 13 (1) of the Revised Charter obliges state parties to undertake to ensure that individuals in specific circumstances, such as those without or in fact those who are unable to secure adequate resources, ‘be granted adequate assistance.’<sup>828</sup> Despite this, the right to social security has only received limited attention and this is represented by the fact that it was one of the final ICESCR rights to receive its own General Comment.<sup>829</sup> Graham observes that Riedel attributes this to both the brevity and

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<sup>822</sup> Lucie Lamarche, ‘The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights’ in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 87–114, 89.

<sup>823</sup> Vladimir Rys, *Reinventing Social Security Worldwide: Back to Essentials* (Policy Press 2010) 27.

<sup>824</sup> International Labour Organization ILO, ‘Social Security (Minimum Standards): Convention No. 102’.

<sup>825</sup> International Labour Organization ILO, ‘Legal Advice Regarding Convention 102’ <[http://www.ilo.org/secsoc/areas-of-work/legal-advice/WCMS\\_205340/lang--en/index.htm](http://www.ilo.org/secsoc/areas-of-work/legal-advice/WCMS_205340/lang--en/index.htm)> accessed 4 February 2020.

<sup>826</sup> Alison Graham, ‘National Debt versus the Right to Social Security: How Should States’ Obligations during a Financial Crisis Be Interpreted?’ (Lancaster University 2017) 88 <<http://www.centreforwelfarereform.org/uploads/attachment/577/national-debt-versus-the-right-to-social-security.pdf>> accessed 4 February 2020.

<sup>827</sup> *ibid.*

<sup>828</sup> Merris Amos, ‘The Second Division in Human Rights Adjudication: Social Rights Claims under the Human Rights Act 1998’ (2015) 15 Human Rights Law Review 549, 551.

<sup>829</sup> Graham (n 826) 85.



vagueness of Article 9 ICESCR.<sup>830</sup> This lack of attention may perhaps create difficulties in determining the content of the right to social security as it has resulted in little being done ‘to determine the content of that right in International Law.’<sup>831</sup> This is perhaps evidenced through the ILO noting in 2010 that the UN human rights regimes ‘have mostly remained silent as to the actual definition of the right to social security and its specific content.’<sup>832</sup>

I opine, contrary to the view that even following the 2008 General Comment No. 19 on the Right to Social Security ‘many ambiguities still surround the content of the right to social security,’<sup>833</sup> that the General Comment does offer some clarification. In this General Comment the CESCR highlights that; benefits can be in cash or in kind;<sup>834</sup> that such benefits ‘must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the Covenant’;<sup>835</sup> that full respect must be paid to the concept of human dignity;<sup>836</sup> and that contributory social security benefits should have ‘a reasonable relationship between earnings, paid contributions, and the amount of relevant benefit.’<sup>837</sup>

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<sup>830</sup> Eibe Riedel ‘The Human Right to Social Security: Some Challenges’ in Eibe Riedel (ed.) *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR - Some Challenges* (Springer-Verlag 2007) 17-28, 18: quoted by *ibid*.

<sup>831</sup> Jennifer Tooze, ‘The Rights to Social Security and Social Assistance: Towards an Analytical Framework’ in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP 2007) 331–359, 331.

<sup>832</sup> International Labour Organization ILO, ‘Extending Social Security to All: A Guide through Challenges and Options’ 12 <[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_146616.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_146616.pdf)> accessed 4 February 2020.

<sup>833</sup> Graham (n 826) 85.

<sup>834</sup> CESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9) (2007) UN.Doc. E/C.12/GC/19’ (n 504) para 22.

<sup>835</sup> *ibid*.

<sup>836</sup> *ibid*.

<sup>837</sup> *ibid*.

Further, the right to social security , complemented by other measures, ‘plays an important role in supporting the realization of many of the rights in the Covenant.’<sup>838</sup> Despite this, there has been ‘limited work in establishing the minimum essential levels of the right to social security, and so far, the CESCR has rarely found violations of the minimum essential levels even when people are starving.’<sup>839</sup> This demonstrates the wide margin of discretion which the CESCR affords to States Parties’ with regard to the level of social security provision. Additionally, this suggests that, with regard to minimum essential levels of realising the social security, the States Parties’ obligations are for a low level of realisation. In respect of this level being so low that individuals are starving, this suggests that the minimum essential level of the right to social security is not sufficient to realise – in this example – the minimum essential levels of the right to food.

A distinction can be made between social security and social assistance with such a classification distinguishing between contribution-based social security, which is regarded as earned, and the non-contributory-based social assistance.<sup>840</sup> Social assistance is regarded by Eide as separate to social security in that ‘assistance is often discretionary and, therefore, neither a right nor a duty.’<sup>841</sup> ILO convention 102 prescribes nine types of social security.<sup>842</sup> This convention is pertinent in relation to the right to social security as this list, of nine differing forms of social security, is repeated in the reporting guidelines for States parties under Article 9 of the ICESCR,<sup>843</sup> ‘reflecting the importance of ILO standard-setting for the understanding

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<sup>838</sup> *ibid* 28.

<sup>839</sup> Graham (n 826) 131.

<sup>840</sup> Martin Scheinin, ‘The Right to Social Security’ in Asbjorn Eide et al (ed), *Economic, Social and Cultural Rights: A Textbook* (Second Revised Edition, Kluwer International Law 2001) 211–221, 211.

<sup>841</sup> Eide, ‘Adequate Standard of Living’ (n 114) 202.

<sup>842</sup> ILO, ‘Social Security (Minimum Standards): Convention No. 102’ (n 824).

<sup>843</sup> Secretary General of the United Nations, ‘Compilation of Guidelines on The Form and Content of Reports to Be Submitted by States Parties to The International Human Rights Treaties (2009) UN.Doc. HRI/GEN/2/Rev.6 Chapter 2 (Annex) (B)’ para 27.

of the obligations under the CDESCR.’<sup>844</sup> This can, however, be criticised in focusing social security too narrowly, as it interprets social security as limited to ‘income-based and situation-based benefits for workers and their families.’<sup>845</sup> Despite this, Article 11 (1) of the ICESCR relating to an ASL ‘relates also to social assistance and other needs-based forms of social benefits in cash or in kind to anyone without adequate resources.’<sup>846</sup> Furthermore, Article 9 ICESCR specifies that social security includes social insurance and although the Article fails to define social security this allows the inference to be drawn that Article 9 relates to both contributory and non-contributory social security benefits with the CDESCR also explicitly specifying ‘that the right to social security includes the right to social assistance.’<sup>847</sup> Therefore, contrary to the view that social assistance is discretionary and therefore not a right, it is clear that a right to social assistance exists within the context of the right to social security. The traditional elements assigned to contributory and non-contributory social security are both included within the ILO’s commitment to social protection which covers contextually specific social security levels securing protection which prevents or alleviates ‘vulnerability and social exclusion.’<sup>848</sup> This inclusion reaffirms the importance of both contributory and non-contributory aspects of the right to social security.

Thus, the term social security is often used in general meaning as an umbrella term covering both contribution-based social security benefits and non-contribution-based social assistance benefits. Unless specified otherwise, I use the term social security in this general meaning.

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<sup>844</sup> Scheinin (n 840) 214–215.

<sup>845</sup> *ibid.*

<sup>846</sup> *ibid* 215.

<sup>847</sup> CDESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9) (2007) UN.Doc. E/C.12/GC/19’ (n 504) para 4 (b).

<sup>848</sup> Graham (n 826) 96.

The ILO has determined that basic social security guarantees should consider that ‘basic income security should allow life in dignity’<sup>849</sup> and the adequacy of social security benefits is an important tool in determining the content of the right. This is because declining levels of adequacy, in regard to social security provision, exacerbate the difficulties faced in ‘making ends meet.’<sup>850</sup> Tooze suggests that a rights-based approach to social security benefits should focus on the individual as opposed to family units.<sup>851</sup> More so social assistance should protect against poverty whereas contribution-based benefits should allow reasonable income levels to be maintained.<sup>852</sup> The contributory versus non-contributory distinction contemplates different standards of adequacy for contributory as opposed to non-contributory social security benefits. This is further evidence of the belief that contributory benefits are more valid than those of a non-contributory nature. Despite Tooze’s distinction, others, such as Graham, have highlighted that human rights practitioners have stipulated that the number of benefits, which relates to adequacy, ‘must also enable the person to graduate from poverty.’<sup>853</sup>

This suggests that the existence of poverty is a determining factor in the assessment of the adequacy and availability of social assistance<sup>854</sup> and demonstrates the link between inadequate social security provision and poverty. The role of poverty, in making this assessment, is further demonstrated by Graham’s contention that in order ‘to comply with international human rights law, social security must be accessible to all those in need and of an adequate level to ensure that people can escape poverty.’<sup>855</sup> As poverty was demonstrated to be

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<sup>849</sup> ILO, ‘Social Protection Floors Recommendation: Recommendation 202, Geneva, 101st ILC Session (14 Jun 2012)’ (n 814) recommendation 8 (b).

<sup>850</sup> Eileen Evason and Roberta Woods, *Poverty, Charity and ‘Doing the Double’* (Avebury 1995) 51.

<sup>851</sup> Tooze (n 831) 343.

<sup>852</sup> *ibid.*

<sup>853</sup> Graham (n 826) 105.

<sup>854</sup> Tooze (n 831) 346.

<sup>855</sup> Graham (n 826) 122.

linked to destitution in chapter two, this suggests that an assessment of the adequacy of social security provision can inform an assessment of whether an individual is experiencing destitution. Therefore, the adequacy of social security must be considered.

The adequacy of social security provisions can be adjudged using a combination of four methods; minimum standards; cost of living; duration; and the specific level of benefits.<sup>856</sup> For example, the CESCR has recommended that the United Kingdom should ‘restore the link between the rates of State benefits and the costs of living.’<sup>857</sup>

Beyond this, and more quantifiably, the European Parliament determines social security provision schemes to be adequate if, under such provisions, minimum incomes are ‘at a level equivalent to at least 60% of median income in the member state concerned.’<sup>858</sup> More so, the Tooze highlights that the CESCR has used the minimum wage as the standard of adequacy and has also ‘challenged the adequacy of the minimum wage itself, thus recognizing the limitation of this method of poverty calculation.’<sup>859</sup> This challenge exists as to determine the adequacy of social security based upon a minimum wage which is not in itself adequate enough to allow individuals to realise their own right to social security would result in inadequate realisation of the right to social security despite the social security provisions being determined to be adequate.

The CESCR has stressed the importance of the right to social security in ‘guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of

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<sup>856</sup> Tooze (n 831) 344–345.

<sup>857</sup> CESCR, ‘Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ (2016) E/C.12/GBR/CO/6’ (n 613) para 41 (b).

<sup>858</sup> Graham (n 826) 106.

<sup>859</sup> Tooze (n 831) 347 offers E/C.12/1996/SR.14, para 25(Guatemala); E/C.12/1997/SR.40, para 14(Azerbaijan); E/C.12/1999/SR.9, para 10 (Solomon Islands); E/C.12/1/add 65, para 9 (Ukraine); and E/C.12/1/add 66, paras 23 and 49 (Nepal) as examples of this.

their capacity to fully realize their Covenant rights.’<sup>860</sup> Given the major role that social security plays in combating poverty<sup>861</sup> and its links to the right to an ASL<sup>862</sup> it can be considered alongside the notion of destitution. Given the place of social security in contributing to the realisation of all human rights, as well as its especially intimate links to the already highlighted component rights of the destitution definition, I consider the right to social security to also be a component right of the rights-based definition of destitution. This is especially so given the causal relationship which exists between social security and destitution in the U.K. which is addressed in the next chapter.

#### **4.4. Concluding Remarks: A Rights-Based Destitution Definition**

Utilising the destitution themes highlighted in chapter 2, this chapter has identified the component rights of a human rights-based definition of destitution. These component rights are the right to an adequate standard of living: the right to clothing, the right to housing, the right to food, the right to water, the right to sanitation, and the right to social security. This chapter examined the sources and content of each of these rights and in doing so justified the status of these rights as component rights.

Throughout examining the content of these rights, the minimum core obligations and the normative content were made clear. This will be of importance in Part Two of this thesis when this human rights-based destitution definition is applied to the context of the UK.

Alongside the findings of the previous chapter, the findings from this chapter allow the

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<sup>860</sup> CESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9) (2007) UN.Doc. E/C.12/GC/19’ (n 504) para 1.

<sup>861</sup> Emmanuel Reynaud, ‘The Right to Social Security — Current Challenges in International Perspective’ in Eibe Riedel et al (ed), *Social Security as a Human Right* (Springer-Verlag 2007) paras 1–15, 14; see also CESCR, ‘General Comment No. 19: The Right to Social Security (Art. 9) (2007) UN.Doc. E/C.12/GC/19’ (n 504) para 3; ILO, ‘Social Protection Floors Recommendation: Recommendation 202, Geneva, 101st ILC Session (14 Jun 2012)’ (n 814) para preamble.

<sup>862</sup> Graham (n 826) 86 Article 25 UDHR is highlighted as demonstrating this link.

theoretical and logical human rights-based definition of destitution enunciated at the beginning of Part One of this thesis to be given greater precision. In drawing Part One of this thesis to a close, this chapter has clarified the component rights. In clarifying – and giving precision to – the two elements of my human rights-based definition of destitution – the component rights and the destitution threshold – the third and fourth chapters of this thesis form the basis from which I will apply my human-rights based definition of destitution to the context of the UK in Part two of this thesis.

My starting point was that an individual is considered destitute if any one or more of their *component rights* are not realised to the *destitution threshold*. Thus, under this definition, an individual is considered destitute if any one or more of their rights to an adequate standard of living, the right to clothing, the right to housing, the right to food, the right to water, the right to sanitation, and the right to social security, are not realised to the destitution threshold.

Combined with the findings of chapter 3, my human rights-based definition of destitution considers that an individual will always be destitute if any of these component rights is not realised to the minimum core obligation in such a way as to protect individuals from the severe indignity and vulnerability inherent to reliance on charitable assistance provision. Beyond this first most basic – and universal - level of freedom from indignity and vulnerability in the realisation of the component rights; an individual will also be considered destitute under the second composite element of the destitution threshold if any one or more of their component rights is not realised to a level in such a way that each of the concepts of availability, accessibility, acceptability, affordability, and quality are met free from vulnerability and indignity. Part Two of this thesis will apply this definition to the context of the United Kingdom.

## **Part Two: Destitution and Human Rights in the United Kingdom**



# **Chapter 5: Austerity: The Context of Destitution in the United Kingdom**

## **5.1. Introduction**

Fitzpatrick et al.'s contention that the leading causes of destitution in the UK are social security related<sup>863</sup> necessitates an examination of austerity within this thesis. This is because austerity, being the context of the UK's domestic social and economic policies since 2010, has influenced social security policies and provision within the UK. These austerity driven policies have been described as 'having drastic impacts on the ability of individuals and families to subsist.'<sup>864</sup> The theme of subsistence is central to my grounding of destitution within the sphere of human rights. Therefore, I justify the examination of austerity in relation to destitution within the United Kingdom due to the links which exist between the austerity driven policies which are contributing to destitution itself.

Such an examination must therefore take place in order to properly apply my rights-based definition of destitution to the context of the United Kingdom. This is especially so given that the right to social security constitutes a component right of this definition and, more so, the intimate links which exist between the realisation of the right to an adequate standard of living – and as such all other component rights – and the right to social security.<sup>865</sup> This is because many such austerity driven policies have been in the field of social security synonymously referred to as welfare or benefits.<sup>866</sup> More so, many of these austerity driven social security reforms were included in the Welfare Reform Act 2012 over which the Joint

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<sup>863</sup> Fitzpatrick et al. (n 2) 3.

<sup>864</sup> Samuel Strong, 'Food Banks, Actually Existing Austerity and the Localisation of Responsibility' [2018] *Geoforum* 1.

<sup>865</sup> See chapter 2.4.1.; see also chapter 4.2.

<sup>866</sup> The 2010 Conservative Party Manifesto contained policies aimed at reducing public spending and welfare dependency by simplifying social security and making work pay. See Oette (n 326) 671–672.

Committee on Human Rights (JCHR) has raised several concerns as to the acts compatibility with the UK's human rights obligations.<sup>867</sup>

In order to examine the context of austerity – and its implications for destitution – in the UK, this chapter will firstly define austerity and its rationale. Following this, arguments against austerity will be examined. The following two sections will outline how austerity in the UK has manifested itself and what the effects of this have been. This leads to my contention that austerity in the UK since 2010 has been inherently destitution inducing. Through examining austerity, this chapter will form the basis from which my human rights-based definition of destitution will be applied to the context of the UK in the following chapters.

## **5.2. Austerity**

Although widespread debate exists as to its definition,<sup>868</sup> austerity, as commonly understood in the United Kingdom, is most associated with the global financial crisis of the first decade of the 2000s with austerity being regarded as a consequence of, response to,<sup>869</sup> and attempt to alleviate<sup>870</sup> the effects of this crisis through reducing the public expenditure<sup>871</sup> in order to reduce debt.<sup>872</sup>

However, attributing the beginnings of austerity to this global financial crisis has been described by Ruckert and Labonté as a 'gross misconception.'<sup>873</sup> Instead they posit that 'the

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<sup>867</sup> *ibid.*

<sup>868</sup> Marie Clarke et al., 'The Impact of Austerity on Irish Higher Education Faculty' (2018) 75 *High Educ* 1047, 1049.

<sup>869</sup> Colm O'Cinneide, 'Austerity and the Faded Dream of a "Social Europe"' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 169–201, 185.

<sup>870</sup> Paul Widdop and others, 'Austerity, Policy and Sport Participation in England' (2018) 10 *International Journal of Sport Policy and Politics* 7, 7.

<sup>871</sup> Oette (n 326) 669.

<sup>872</sup> Graeme Hayes, 'Regimes of Austerity' (2017) 16 *Social Movement Studies* 21, 21.

<sup>873</sup> Arne Ruckert and Ronald Labonté, 'Health Inequities in the Age of Austerity: The Need for Social Protection Policies' (2017) 187 *Social Science & Medicine* 306, 307.

origins of the current austerity drive can be traced back to the early 1970s'<sup>874</sup> whilst Trommer suggests that the 'age of austerity' can be defined as an era 'starting roughly in the 1990s.'<sup>875</sup> This variance can be better understood through regarding austerity as originating from – and being a manifestation of – 'almost 40 years of a dominant neoliberal economic orthodoxy.'<sup>876</sup> This can be supported with Gualerzi's description of austerity within the Eurozone as being a 'crucial aspect of neoliberalism'<sup>877</sup> as well as the contention that elements of austerity 'are already structurally central to neoliberalism.'<sup>878</sup> More specifically, features of neo-liberal orthodoxy such 'deregulation, privatisation, free trade and investment, and the withdrawal of the state from many areas of social provision'<sup>879</sup> are central tenets of austerity. It follows that conceptions of austerity as linking strongly to neoliberalism are well founded. Given this analysis, austerity can be regarded as a continuation of and, post-global financial crisis, 'intensification of established neoliberal dynamics'<sup>880</sup> offering 'an economic policy akin to neoliberalism.'<sup>881</sup> In this sense, austerity has been used by states as a tool by which to further entrench 'the neoliberal model.'<sup>882</sup>

Blyth's definition of austerity is often quoted,<sup>883</sup> and can serve to consolidate such

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<sup>874</sup> *ibid.*

<sup>875</sup> Silke Trommer, 'Watering Down Austerity: Scalar Politics and Disruptive Resistance in Ireland' [2018] *New Political Economy* 1, 1.

<sup>876</sup> Ruckert and Labonté (n 873) 306.

<sup>877</sup> Davide Gualerzi, 'Crisis in the Eurozone: Austerity and Economic Transformation' (2017) 49 *Review of Radical Political Economics* 394, 394.

<sup>878</sup> Hayes (n 872) 22–23.

<sup>879</sup> Margot E Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21 *European Law Journal* 521, 541.

<sup>880</sup> Hayes (n 872) 22–23.

<sup>881</sup> Salomon (n 879) 542.

<sup>882</sup> Joe Wills and Ben TC Warwick, 'Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse' (2016) 23 *Indiana Journal of Global Legal Studies* 629, 630.

<sup>883</sup> Salomon (n 879) 542; Widdop and others (n 870) 7; Cuz Potter and Jeeyeop Kim, 'Austerity in Reverse: Korea, Capabilities, and Crisis' [2018] *International Planning Studies* 1, 7; Wendy Rose and Colette McAuley, 'Poverty

conceptions of austerity. Blyth regards austerity as ‘a form of voluntary deflation in which the economy adjusts through the reduction of wages, prices, and public spending to restore competitiveness, which is (supposedly) best achieved by cutting the state's budget, debts and deficits.’<sup>884</sup> Despite drawing on widely used definitions, Blyth’s definition is reflective of the experience of more economically developed nations with the suggestion that austerity is voluntary only holding true ‘in a handful of cases.’<sup>885</sup> Even so, given that the purpose of this chapter is to examine destitution *in the context of the UK* this criticism can be negated. This is because austerity in the UK has been characterised as ‘an ideological choice, rather than financial necessity.’<sup>886</sup> Regarding austerity as a choice<sup>887</sup> supports the contention that austerity in the UK has been voluntary. It follows that Blyth’s definition of austerity is appropriate in the context of the UK and is thus appropriate for this thesis.

Characterised as cuts to public spending, Oette contends that austerity has resulted in financial hardship whilst at the same time adversely impacting ‘persons’ well-being, inter alia, contributing to, if not causing, severe health problems and suicides.’<sup>888</sup> This contention rests on the fact that such cuts to the public expenditure have reduced welfare budgets<sup>889</sup> which has impacted on the provision of essentials such as social spending, unemployment assistance and housing support.<sup>890</sup> This further demonstrates the relevance of austerity to my exploration of

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and Its Impact on Parenting in the UK: Re-Defining the Critical Nature of the Relationship through Examining Lived Experiences in Times of Austerity’ [2019] *Children and Youth Services Review* 134, 139.

<sup>884</sup> Mark Blyth, *Austerity: The History of a Dangerous Idea* (OUP 2013) 2.

<sup>885</sup> Potter and Kim (n 883) 2.

<sup>886</sup> Joana Vassilopoulou and others, ‘International Perspectives on Securing Human and Social Rights and Diversity Gains at Work in the Aftermath of the Global Economic Crisis and in Times of Austerity’ (2019) 16 *European Management Review* 837, 2.

<sup>887</sup> Jen Birk, ‘Tax Avoidance as an Anti-Austerity Issue: The Progress of a Protest Issue through the Public Sphere’ (2017) 32 *European Journal of Communication* 296, 297; Vassilopoulou and others (n 886) 1.

<sup>888</sup> Oette (n 326) 670.

<sup>889</sup> Hayes (n 872) 24.

<sup>890</sup> Carolyn Sargent and Laurence Kotobi, ‘Austerity and Its Implications for Immigrant Health in France’ (2017) 187 *Social Science & Medicine* 259.

austerity.

### 5.3. Anti-Austerity Rationale

Proponents of austerity are able to support their position using ‘strong theoretical arguments that austerity measures can achieve the desired results.’<sup>891</sup> This is because such policies may ‘improve the economic and fiscal performance of countries.’<sup>892</sup> Despite these strong theoretical foundations underpinning austerity policies, the underlying ideology has been ‘widely contested’<sup>893</sup> and austerity has been widely criticised for a multitude of reasons. So much so, in fact, that Pfeiffer et al. have argued as recently as 2017 that there is a growing consensus ‘that austerity in Europe was a mistake in both humanitarian and economic terms.’<sup>894</sup> One reason for this is the argument that governments often have little choice but to run fiscal deficits in order to achieve ‘minimum standards of living.’<sup>895</sup> Austerity aims at reducing fiscal deficits. It follows that, if these deficits are required to achieve minimum standards of living, austerity undermines the attainment of these minimum standards of living.

Vassilopoulou et al. highlight that ‘it is argued by many that the neoliberal doctrine of austerity does not work’<sup>896</sup> whilst also highlighting that the IMF has made such arguments.<sup>897</sup> The contention that austerity has utterly failed to deal with financial crises is supported by the idea of ‘the paradox of austerity’. That is, it has been argued that austerity policies have, rather

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<sup>891</sup> Petra Došenović Bonča and Maks Tajnikar, ‘Austerity Policies, Economic Growth and Fiscal Balance: Lessons from Slovenia’ (2018) 36 Zb. Rad. Ekon. Fak, Rij. 285, 286.

<sup>892</sup> Surajit Das and Israa A El. Husseiny, ‘Paradox of Austerity: Multi-Country Evidence’ [2018] *Emerging Markets Finance & Trade* 1, 2.

<sup>893</sup> Rose and McAuley (n 883) 139.

<sup>894</sup> Pfeiffer et al. contend that this view is shared ‘even among elements of the so-called “Troika” (The IMF, the European commission, and the European Central Bank)’ in James Pfeiffer and others, ‘Austerity and the “Sector-Wide Approach” to Health: The Mozambique Experience’ (2017) 187 *Social Science & Medicine* 208, 215.

<sup>895</sup> Das and El. Husseiny (n 892) 2.

<sup>896</sup> Vassilopoulou and others (n 886) 12.

<sup>897</sup> *ibid.*

than curing the effects of the global financial crisis, instead exacerbated them. Neo-Keynesian economists, for example argue that ‘curtailing government spending in a downturn undermines economic demand.’<sup>898</sup>

A study of 12 European countries between 2006 and 2013 found that austerity increased inequality<sup>899</sup> and this is in no small part due to the record unemployment rates and mass social insecurity it has ‘helped to bring about.’<sup>900</sup> Salomon highlights a 2013 IMF paper as challenging austerity in ‘finding that ‘fiscal consolidation [austerity] typically raises income inequality, raises long-term unemployment and lowers the share of wage income’.’<sup>901</sup>

Contrary to commonly held perceptions, reductions in government expenditure do ‘not necessarily reduce the fiscal deficit to GDP ratio.’<sup>902</sup> This is because measures aimed at reducing the fiscal deficit may also reduce the GDP. Therefore, it may be preferable to instead increase public expenditure in order to stimulate a proportionally larger growth in GDP.<sup>903</sup> This would reduce the fiscal deficit to GDP *ratio* whilst at the same time increasing the fiscal deficit. This is as opposed to austerity policies which instead reduce the fiscal deficit and undermine economic growth, and thus GDP increases.<sup>904</sup>

However, that is not to state that I believe that austerity policies should never be an option. The aim of ‘long term fiscal sustainability’<sup>905</sup> is an important one. With measures to address debts and deficits serving to recognise ‘that the state needs to plan for longer term

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<sup>898</sup> Nick Anstead, ‘The Idea of Austerity in British Politics, 2003-2013’ (2018) 66 Political Studies 287, 289.

<sup>899</sup> Markus PA Schneider et al., ‘Redistribution in the Age of Austerity: Evidence from Europe 2006–2013’ (2017) 24 Applied Economics Letters 672, 672.

<sup>900</sup> O’Cinneide, ‘Austerity and the Faded Dream of a “Social Europe”’ (n 869) 185.

<sup>901</sup> Salomon (n 879) 543.

<sup>902</sup> Das and El. Husseiny (n 892) 8.

<sup>903</sup> *ibid.*

<sup>904</sup> Schneider et al. (n 899) 675.

<sup>905</sup> Katerina Housos, ‘Austerity and Human Rights Law: Towards a Right-Based Approach to Austerity Policy, a Case Study of Greece’ (2015) 39 Fordham Int’l L.J. 425, 432.

fiscal sustainability, and to begin to address the issue of the affordability of existing welfare commitments in the face of incipient pressure from rapidly ageing populations and rising healthcare and social care costs.’<sup>906</sup> Thus, ‘failing to put state welfare commitments on a sustainable footing now effectively borrows from future generations to fund rights now, which shifts vulnerability out into the future.’<sup>907</sup> Given the fact that social spending often constitutes a large percentage of government budgets,<sup>908</sup> this view recognises that austerity policies which reduce social spending may be unavoidable in order to achieve sustainability.<sup>909</sup>

Such sustainability may rest on ‘lowering debt to output ratios.’<sup>910</sup> These ratios, however as the preceding sub-section makes clear, can also be lowered by increasing output rather than simply lowering debt. Therefore, the notion of sustainability can be turned against austerity policies themselves. This is because, despite the recognition that measures may be required to ensure fiscal sustainability, the ‘speed and magnitude’<sup>911</sup> of austerity policies have been self-defeating in that they are ‘likely to have a negative impact on growth; that in turn reduces tax receipts and may increase spending pressures.’<sup>912</sup> In the long-term, therefore, austerity policies may undermine fiscal sustainability.

Wills and Warwick argue that

‘the CESCR does not regard austerity to be necessarily incompatible with the realization of socioeconomic rights. Rather, it has argued that such measures must be

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<sup>906</sup> Mary Dowell-Jones, ‘The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments’ (2015) 15 Human Rights Law Review 193, 206.

<sup>907</sup> *ibid* 211.

<sup>908</sup> *ibid* 209–210.

<sup>909</sup> Wills and Warwick (n 882) 662.

<sup>910</sup> Dawn Holland and Jonathon Portes, ‘Self-Defeating Austerity?’ (2012) 222 National Institute Economic Review F4, F4.

<sup>911</sup> *ibid*.

<sup>912</sup> *ibid*.

compensated for by approaches which enhance the compatibility of those trends and policies with full respect for socioeconomic rights.’<sup>913</sup>

Along this vein, I contend that a human rights-based approach to destitution can be used as a tool by which to guide austerity policies in such a way as to protect individuals in society from the most damaging effects of austerity.

#### **5.4. Austerity in the United Kingdom**

This thesis recognises the importance of social security – and austerity influenced cuts to social security - in relation to destitution in the UK. Given that some areas of social security are devolved to the Northern Irish and Scottish devolved governments, it may be questioned as to why three different analyses of destitution in the UK have not been undertaken: one for England and Wales, one for Northern Ireland, and one for Scotland. However, for a number of reasons, this thesis, undertakes a single overarching analysis of destitution in the UK as a whole.

The first reason for this overarching approach is that regardless of differences in social security provision the UK context specific destitution definition does not alter. That is any alternative social security provision does not result in differing understandings of what it means to be destitute. Rather, the extent to which such destitution is mitigated may instead vary. Secondly, despite being the one region of the UK with ‘devolved social security competencies before 2012’ Northern Ireland ‘has been extremely reluctant to diverge substantially from approaches in Great Britain.’<sup>914</sup>

As such, the focus must be on Scotland. The ‘Scotland Act 2016 devolved various areas of social security to Scotland’<sup>915</sup> and the Social Security (Scotland) Act 2018 ‘represents both

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<sup>913</sup> Wills and Warwick (n 882) 662.

<sup>914</sup> Simpson, McKeever and Gray (n 84) 13–14.

<sup>915</sup> Camilla Kidner, ‘Devolved Social Security Powers: Progress and Plans’ (The Scottish Parliament) 3 <<https://sp-bpr-en-prod-cdnep.azureedge.net/published/2019/5/10/Devolved-social-security-powers--progress-and-plans/SB%2019-27.pdf>> accessed 9 November 2020.



a major step towards the establishment of a devolved system and a legislative statement of intent regarding the development of a Scottish model of social security.’<sup>916</sup> However, the Scottish Government’s devolved social security competencies must be explored. Upon such exploration, it becomes clear that - *at least for now* – these devolved competencies will be of limited effect and limited divergence from England and Wales. This is because the ‘Scottish Government’s priority is ‘safe and secure transfer’ and it does not plan to make major changes to benefits at the point they transfer.’<sup>917</sup> Thus, this offers little scope for divergence from England and Wales and can be used to justify the homogenous analysis of the UK’s system as a whole. Given that the transfer of the newly devolved benefits is not expected to be completed until 2024 ‘the Scottish Government will need to use agency agreements with the DWP to deliver devolved benefits in the interim.’<sup>918</sup>

Alongside this criticism that the devolution of social security competencies to Scotland may have no substantial effect on social security administration until after 2024, it may be argued that this devolution offers only limited scope for improving the social security system in Scotland to better address destitution. This is because devolved competence ‘in relation to the main income replacement benefits’ extends ‘only to control of the housing element of and payment arrangements for universal credit’ and this ‘in turn limits the scope of devolved benefits to contribute to the realisation of the Act’s principle (e) by reducing poverty.’<sup>919</sup>

Although some divergence ‘from England and Wales can be expected in the form of compensation for claimants affected by the social sector size criteria (“bedroom tax”) through a new housing assistance benefit’<sup>920</sup> this does little to alter the fact that the level of Universal

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<sup>916</sup> Simpson, McKeever and Gray (n 84) 14.

<sup>917</sup> Kidner (n 915) 3.

<sup>918</sup> *ibid.*

<sup>919</sup> Simpson, McKeever and Gray (n 84) 22.

<sup>920</sup> *ibid.*

Credit payments will continue to be determined by Westminster. As will eligibility criteria. This lack of control over eligibility criteria results in a lack of ‘control over the sanctions imposed for breach of these conditions, arguably the greatest threat to claimants’ ability to meet their essential needs in the contemporary social security system. The legislation also prohibits the use of devolved benefits to negate the effect of a sanction applied to a reserved benefit’.<sup>921</sup>

As such, devolved social security competencies in Scotland ‘remain limited in their extent.’<sup>922</sup> Consequently, to echo Simpson et al, knowledge that “social security” is being devolved without understanding of the nuances is likely to lead some to anticipate changes to the main out-of-work benefits that *Holyrood cannot deliver at present*.<sup>923</sup> Consequently, ‘if DWP continues along the retrogressive path of recent years, then from a claimant’s perspective *the social security system as a whole is unlikely to improve regardless of the evolution of devolved benefits*.’<sup>924</sup> For these reasons, whilst acknowledging the differences in approaches between the nations of the UK, this thesis address destitution in the UK homogenously and does not undertake individual analyses for the devolved powers. As such, austerity in the UK is addressed holistically.

In the UK austerity measures ‘are often simply called ‘cuts.’’<sup>925</sup> Such cuts have been a feature of UK policies since 2010<sup>926</sup> when, in response to the global financial crisis, the UK’s Conservative and Liberal Democrat Coalition government ‘announced a programme of austerity to be imposed across the country, involving deep cuts to public services that were

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<sup>921</sup> *ibid* 23–24.

<sup>922</sup> *ibid* 30.

<sup>923</sup> *ibid* 31. *My italicisation for emphasis*

<sup>924</sup> *ibid*. *My italicisation for emphasis*

<sup>925</sup> Oette (n 326) 669.

<sup>926</sup> Alison Stenning, ‘Feeling the Squeeze: Towards a Psychosocial Geography of Austerity in Low- to-Middle Income Families’ [2018] *Geoforum* 1.

deemed economically unviable.’<sup>927</sup> The UK, alongside other European Union member states, had been encouraged to implement austerity measures by the European Union with the intention being ‘to restore economic stability across the region.’<sup>928</sup>

In relation to destitution, these ‘very severe,’<sup>929</sup> ‘deep and punishing’<sup>930</sup> cuts targeted the public sector, public services and the welfare state. Bell and Cemlyn highlight the link which exists between the combined effects of cutting welfare, wages and public services ‘and consequent rises in unemployment and deprivation.’<sup>931</sup> Although destitution existed in the UK long before the austerity imposed since 2010, this point demonstrates the cruciality of understanding austerity as the context of destitution *currently*.

Before austerity, for many individuals the component rights of my definition were realised to the destitution threshold through the state provision of services and benefits. During austerity, these same services and benefits have been cut. The cuts which these services have suffered have undermined them and have reduced the UK’s welfare state to ‘a much more minimalist system of social protection.’<sup>932</sup> I contend that these cuts have therefore undermined the realisation of the component rights to the destitution threshold and in section 5.6. I will extend this analysis to argue that austerity, as designed in the UK since 2010, has been inherently destitution inducing.

In relation to cuts to social welfare provision, austerity has been made more palatable

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<sup>927</sup> Emma Craddock, ‘Caring About and For the Cuts: A Case Study of the Gendered Dimension of Austerity and Anti-Austerity Activism’ (2017) 24 *Gender, Work and Organization* 69, 69.

<sup>928</sup> Sargent and Kotobi (n 890) 259.

<sup>929</sup> Clarke et al. (n 868) 150.

<sup>930</sup> Kim Allen, ‘Whose Crisis Counts? Intersectionality, Austerity and the Politics of Survival’ (2018) 41 *Ethnic and Racial Studies* 2301, 2301.

<sup>931</sup> Bell and Cemlyn (n 47) 826.

<sup>932</sup> O’Cinneide, ‘Austerity and the Faded Dream of a “Social Europe”’ (n 869) 186.

for the UK's populace through a 'public narrative'<sup>933</sup> which has allowed the emergence and establishment of a 'new welfare commonsense.'<sup>934</sup> This commonsense holds the cause of the crisis to be 'an overgenerous, bloated and ineffective welfare state rather than the reckless behaviour of financial institutions and the political elites that enabled them.'<sup>935</sup> Specifically, the welfare system was cited as the 'the principle cause of welfare dependency and public sector debt.'<sup>936</sup>

This narrative holds welfare dependency to be inherently bad and is reliant upon the portrayal of the welfare recipient as a deceptive scrounger, and figure of social disgust, which in turn 'enables the state to retreat from providing basic levels of welfare support with reliance on charity becoming the norm for many.'<sup>937</sup> This new commonsense has not only shifted the 'blame' for creating the need for austerity but has also been used to blame the impoverished for their own condition. Through portraying the welfare recipient as a deceptive scrounger, it is suggested that those in receipt of welfare can, if they so wish, improve their own condition through their own choices. This has led to an ideological shift in relation to welfare conditionality. Although welfare conditionality in the UK predates the period of austerity since the global financial crisis,<sup>938</sup> an element of this austerity has been a "punitive turn" in conditionality governing benefit receipt.'<sup>939</sup> Thus, since 2010 conditionality has been extended,

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<sup>933</sup> Allen (n 930) 2301.

<sup>934</sup> Kayleigh Garthwaite and Claire Bambra, 'How the Other Half Live': Lay Perspectives on Health Inequalities in an Age of Austerity' (2017) 187 *Social Science & Medicine* 268, 274.

<sup>935</sup> Allen (n 930) 2301.

<sup>936</sup> Daniel Edmiston, 'Welfare, Austerity and Social Citizenship in the UK' (2017) 16 *Social Policy & Society* 261, 262.

<sup>937</sup> Garthwaite and Bambra (n 934) 274.

<sup>938</sup> Edmiston highlights the concept of creeping conditionality as representative of the increases in conditionality between the 1970s up until 2010 see Edmiston (n 936) 262.

<sup>939</sup> Chris Grover, 'Violent Proletarianisation: Social Murder, the Reserve Army of Labour and Social Security "Austerity" in Britain' [2018] *Critical Social Policy* 1, 4–5.

personalised (according to individual circumstances and needs) and intensified.<sup>940</sup> Labelled ‘welfare austerity’, this ‘fundamental restructuring’ of the UK’s welfare system has altered the relationship between citizen and state to one of more constrained welfare provision.<sup>941</sup>

This restructuring has centred around two mechanisms. Fitness for Work testing and Sanctions. Significant changes to the social security provision catered towards disabled people have occurred since the introduction of Employment and Support Allowance in 2008.<sup>942</sup> Fitness for work testing is used to determine whether or not an individual should be categorised as, or should remain categorised as, being exempt from some aspects of welfare conditionality. This testing has taken the form of ‘fundamentally flawed’<sup>943</sup> work capability assessments. The role of these assessments was to reduce the numbers of people determined by the state as being incapable of paid employment by redefining these people as being fit for work.<sup>944</sup> Thus, a more restrictive approach was adopted with respect to determining individuals as incapable of work and this in turn increased ‘the expectation that the majority of disabled people will make an effort to (re)enter paid work and this is enforced through toughened benefit sanctions.’<sup>945</sup>

It can be inferred that mistakes have been made in classifying individuals as fit for work in some cases. For example, ‘2,380 people have been found to have died as a result of being found fit for work which, in some circumstances, would have seen individuals lose benefits.’<sup>946</sup>

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<sup>940</sup> Edmiston (n 936) 262.

<sup>941</sup> *ibid* 263.

<sup>942</sup> Chris Grover, ‘Commodification, Disabled People, and Wage Work in Britain’ (2015) 4 *Canadian Journal of Disability Studies* 106, 123.

<sup>943</sup> Chris Grover, ‘The End of an Era? The Resignation of Iain Duncan Smith, Conservatism and Social Security Benefits for Disabled People’ (2016) 31 *Disability & Society* 1127, 1127.

<sup>944</sup> Chris Grover, ‘Atos Healthcare Withdraws from the Work Capability Assessment: A Comment’ (2014) 29 *Disability & Society* 1324, 1324.

<sup>945</sup> Chris Grover and Karen Soldatic, ‘Neoliberal Restructuring, Disabled People and Social (in)Security in Australia and Britain’ (2013) 15 *Scandinavian Journal of Disability Research* 216, 228.

<sup>946</sup> Luke David Graham, ‘Austerity Policies as Crimes against Humanity: An Assessment of UK Social Security Policy since 2008’ [2018] *Queen Mary Law Journal* 5, 15.

Of the forty-nine such deaths investigated by the DWP twenty-percent of the deceased ‘had their benefits sanctioned at some stage.’<sup>947</sup> Additionally, Mills highlights calculations that ‘80 people per month are dying in the UK after being found ‘fit to work’.’<sup>948</sup> Although the DWP asserts that, as the causes of death were not recorded in collecting this data, “no causal effect between the benefit and the number of people who died should be assumed”<sup>949</sup> it is suggested that these figures demonstrate that errors may be made in determining individuals as fit for work. When such errors do occur, as these figures demonstrate, the effects may be devastating for those subjected to them. These effects are amplified by the fact that individuals who are wrongly deemed as fit for work may be unable to meet the conditions imposed upon them by the increased conditionality resulting from such a determination. Failing to meet such conditions may result in individuals becoming subject to the second mechanism. Sanctions.

Imposed when individuals fail to meet the conditions imposed upon them, sanctions constitute a suspension of social security payments<sup>950</sup> and in the context of austerity are ‘being used much more widely and frequently than ever before.’<sup>951</sup> These sanctions are used as a tool by which to force those individuals subject to them into wage-labour.<sup>952</sup> This is with the aim of reducing social security expenditure. However, in practice, such sanctions do not result in individuals immediately, if at all, entering wage-labour. As such, at least for the period of the sanction or sooner if the individuals enter wage-labour, there will be a period of time in which

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<sup>947</sup> *ibid.*

<sup>948</sup> China Mills, “‘Dead People Don’t Claim’: A Psychopolitical Autopsy of UK Austerity Suicides’ (2018) 38 *Critical Social Policy* 302, 303.

<sup>949</sup> Department of Work and Pensions DWP, ‘Mortality Statistics: Employment and Support Allowance, Incapacity Benefit or Severe Disablement Allowance’ 9 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/459106/mortality-statistics-esa-ib-sda.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/459106/mortality-statistics-esa-ib-sda.pdf)> accessed 6 January 2017.

<sup>950</sup> Oette (n 326) 676.

<sup>951</sup> Edmiston (n 936) 263.

<sup>952</sup> Grover, ‘Violent Proletarianisation: Social Murder, the Reserve Army of Labour and Social Security “Austerity” in Britain’ (n 939) 2.

sanctions often effectively leave those subject to them ‘without disposable income.’<sup>953</sup> Due to this reduction in disposable income, many of those subject to sanctions had to reduce their food consumption whilst some ‘had been left to scrounge for food from skips or bins, or had had to resort to begging to feed themselves.’<sup>954</sup>

Additionally, those subject to sanctions often had to rely on charitable sources of food provision, such as foodbanks.<sup>955</sup> Demonstrated by the rising number of foodbanks within the UK since the global financial crisis and especially so ‘since the introduction of austerity policies from 2011 onwards,’<sup>956</sup> a clear correlation exists between austerity and the use of foodbanks. Combined with fact that increased food bank usage has been correlated to increased rates of benefit sanctioning and other elements of austerity,<sup>957</sup> it is contended that food banks evidence the pertinence of austerity to an analysis of destitution within the UK. This is because foodbanks demonstrated how increased conditionality as a result of austerity policies have fostered increasingly precarious modes of living which in turn have contributed to significant uncertainty.<sup>958</sup> In relying on charitable donations, often from the local area,<sup>959</sup> food banks clearly evidence the existence of my third destitution theme: vulnerability – in this instance evidenced through a reliance on discretionary transfers namely charitable assistance.

The pertinence of this example rests on the fact that one of my component rights, the right to food, is commonly only realised in the UK via the use of foodbanks. That is via a charitable source. The implications of this in the sphere of human rights have been addressed

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<sup>953</sup> Oette (n 326) 689.

<sup>954</sup> *ibid* 690.

<sup>955</sup> *ibid* 677.

<sup>956</sup> Strong (n 864) 4.

<sup>957</sup> Garthwaite and Bamba (n 934) 269.

<sup>958</sup> Vassilopoulou and others (n 886) 11.

<sup>959</sup> Strong (n 864) 4.

in greater detail above,<sup>960</sup> however for the purposes of this section foodbanks serve to demonstrate the relevance of austerity to destitution. This contention rests on the fact that all three of the destitution themes which I have highlighted are evidenced in the usage of foodbanks. Combined with the fact that foodbanks are intimately connected to the right to food, a component right of my rights-based definition of destitution, it is argued that foodbanks inherently relate to destitution. It follows that, if foodbanks are a direct response to the outcomes of austerity driven policies, austerity driven policies and austerity more generally inherently relate to destitution.

### **5.5. Effects of Austerity**

In 2014, it was observed by the Social Security Advisory Committee that there exists a lack of clarity concerning the cumulative effect of austerity influenced welfare reform. This lack of clarity is said to stem from the treatment of individual policies in isolation with respect to impact assessments<sup>961</sup> and in 2013 there had ‘been no systematic attempts to understand the cumulative impacts of all of the Government’s reforms on claimants, their households and the communities in which they live.’<sup>962</sup>

Wilson et al provide an overview of the reforms to benefits announced since the coalition government took office in 2010. These include changes to tax credits; changes to housing benefit for private renters; changes to deductions taken from Housing Benefit and Council Tax Benefit; restricting contributory employment and support allowance to one year; replacing the disability living allowance; abolishing council tax benefit; introducing the

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<sup>960</sup> See chapter 2.2; see also section 5.6.; see also my human rights-based criticism of reliance on charitable provision throughout chapter 6.3.

<sup>961</sup> Social Security Advisory Committee, ‘The Cumulative Impact of Welfare Reform: A Commentary’ (2014) 20 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/324059/ssac\\_occasional\\_paper\\_12\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/324059/ssac_occasional_paper_12_report.pdf)> accessed 12 November 2020.

<sup>962</sup> Tony Wilson and others, ‘The Local Impacts of Welfare Reform: An Assessment of Cumulative Impacts and Mitigations’ (Local Government Association 2013) 9 <<http://www.learningandwork.org.uk.gridhosted.co.uk/wp-content/uploads/2017/01/The-local-impacts-of-welfare-reform-version-7.pdf>> accessed 14 November 2020.



‘bedroom tax’; introducing a household benefit cap; limiting the increase of benefits; and the introduction of universal credit.<sup>963</sup> Furthermore, welfare reforms have been disproportionately felt by some groups more than others partly because a number of reforms simultaneously affect some groups more than others, ‘making the cumulative financial loss greater.’<sup>964</sup>

It is clear from this overview that these reforms cannot be treated in isolation. Consequently, the government’s failure to examine the cumulative impacts of these policies may be regarded as a failure to adequately assess the true impact of any policy. This is because the impacts of policies are not experienced in isolation from each other. Consequently, the Social Security Advisory Committee has observed that ‘it is likely, however, that the whole is greater than the sum of its parts’ and that as such impact assessments should ‘evaluate the overall impact of this reform programme.’<sup>965</sup>

In a 2017 Report, the Child Poverty Action Group provide a comprehensive overview of the cumulative impact of the austerity measures announced in 2010, 2012, and 2015.<sup>966</sup> The cumulative effect of welfare reforms following The Welfare Reform and Work Bill 2015-16 has been estimated to result in ‘a real terms cut of 8% between 2012 and 2019’<sup>967</sup> for those in receipt of benefits. In addition to this, studies have predicted that ‘seven million low-income households will see their incomes lower by on average £31 per week by 2020 in cash terms, as a consequence of cumulative welfare changes – equivalent to a reduction in welfare spending

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<sup>963</sup> *ibid* 10.

<sup>964</sup> Tony Wilson and Sarah Foster, ‘The Local Impacts of Welfare Reform: A Review of the Impacts of Welfare Changes on People, Communities and Services’ (Learning and Work Institute 2017) 26 <<https://www.local.gov.uk/sites/default/files/documents/FINAL%20Review%20of%20impacts%20of%20welfare%20reform%20report%20to%20LGA%20Oct%2017-1.pdf>> accessed 14 November 2020.

<sup>965</sup> Social Security Advisory Committee (n 961) 5.

<sup>966</sup> Child Poverty Action Group, ‘The Austerity Generation: The Impact of a Decade of Cuts on Family Incomes and Child Poverty’ (2017) <<https://cpag.org.uk/sites/default/files/files/Austerity%20Generation%20FINAL.pdf>> accessed 12 November 2020.

<sup>967</sup> Stephen Kennedy, Chris Murphy and Wendy Wilson, ‘Welfare Reform and Disabled People’ (House of Commons Briefing Paper 2016) 23 <<https://commonslibrary.parliament.uk/research-briefings/cbp-7571/>> accessed 14 November 2020.

of more than £11 billion per year.’<sup>968</sup> The impacts of this can be seen in the finding of a cumulative impact assessment by Liverpool City Council which found that the cumulative effects of previous and new welfare reforms ‘are likely to increase the number of citizens requiring support from the scheme.’<sup>969</sup> Troublingly, concerns have also been raised that the perceived advantages of universal credit are undermined by earlier welfare reforms.<sup>970</sup>

In analysing these cumulative impacts, Edmiston observes that ‘cumulatively, welfare austerity has made the material and symbolic benefits of social citizenship ‘increasingly conditional, exclusive and selective.’’<sup>971</sup> Additionally, Wilson and Foster observe that the cumulative impacts of the most significant changes to the welfare system are ‘growing year on year.’<sup>972</sup> As such, given the clear interrelationship between the many austerity influenced welfare reforms which have occurred in the last decade, this thesis addresses the austerity project holistically with some focus on specific policies used to illustrate general points.

The analysis above demonstrates the inherent links between austerity policies and rising destitution levels in the context of the UK. Austerity has impoverished not only those dependent on welfare but also working families.<sup>973</sup> This point serves to evidence the claim that austerity has broadened the scope of those at risk of destitution by bringing the threat of deprivation and destitution to a broader population within the ‘recently relatively affluent

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<sup>968</sup> Wilson and Foster (n 964) 11.

<sup>969</sup> Liverpool City Council, ‘Welfare Reform Cumulative Impact Analysis 2016 - Interim Report: February 2017’ (Liverpool City Council 2017) 46 <[https://liverpool.anglican.org/userfiles/files/News/2017/Liverpool%20Welfare%20Reform%20Cumulative%20Impact%20Analysis\\_Interim%20Report\\_Final%20VersionWeb.pdf](https://liverpool.anglican.org/userfiles/files/News/2017/Liverpool%20Welfare%20Reform%20Cumulative%20Impact%20Analysis_Interim%20Report_Final%20VersionWeb.pdf)> accessed 14 November 2020. ‘The Scheme’ is defined in page 24 of this report and refers to the Liverpool Citizens Support Scheme. This Local Welfare Provision provides two types of award: Urgent Needs Awards and Home Needs Awards. Urgent Needs Awards provide financial assistance ‘usually with the costs of food, fuel, or clothing.’ ‘Home Needs Awards help to establish or maintain a home.’

<sup>970</sup> Anne Power and others, ‘The Impact of Welfare Reform on Social Landlords and Tenants’ (Joseph Rowntree Foundation 2014) 6 <<https://www.jrf.org.uk/file/45542/download?token=EBiYZWkH&filetype=full-report>> accessed 14 November 2020.

<sup>971</sup> Edmiston (n 936) 263.

<sup>972</sup> Wilson and Foster (n 964) 11.

<sup>973</sup> Rose and McAuley (n 883) 140.

world.’<sup>974</sup> More so, this demonstrates the paradox of welfare conditionality. This is because this conditionality aims to encourage individuals into wage-labour despite the fact that such labour does not allow individuals to avoid impoverishment. Combined with weakening social protection, and as such increasing impoverishment, austerity has transformed the global financial crisis into a crisis of health and social wellbeing. Therefore, austerity has had implications outside of the economic sphere and a side-effect of austerity – as a treatment for the financial crisis – has been to negatively impact health and social wellbeing.

This crisis has been argued to harm the most vulnerable and disadvantaged in society.<sup>975</sup> This is because the cuts have disproportionality affected poor,<sup>976</sup> ‘lower income, working-age,’<sup>977</sup> ‘sick and disabled’<sup>978</sup> people. This is not only true within countries but is also the case in the global sense.<sup>979</sup> In the context of the UK, ‘research confirms that the most deprived areas and communities have been hardest hit by cuts.’<sup>980</sup> This aids in understanding the fact that by 2017 only the top 1% of UK households had returned to pre global financial crisis levels with the rest of UK households finding ‘it still more difficult to make ends meet.’<sup>981</sup>

Thus, as wealthier households have benefitted disproportionality from austerity policies,<sup>982</sup> austerity affects the already vulnerable more so than it does other groups. This is

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<sup>974</sup> Gargi Bhattacharyya, *Crisis, Austerity, and Everyday Life* (Palgrave Macmillan 2015) 93.

<sup>975</sup> Anstead (n 898) 287.

<sup>976</sup> Paul O’Connell, ‘Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity’ in Aoife Nolan et al. (ed), *Human Rights and the Public Finance* (Hart Publishing 2013) 59–76, 63.

<sup>977</sup> Simon Griffiths and Henry Kippin, ‘Public Services after Austerity: Zombies, Suez or Collaboration?’ (2017) 88 *The Political Quarterly* 417, 417–418.

<sup>978</sup> Widdop and others (n 870) 8.

<sup>979</sup> Magdalena Sepúlveda Carmona, ‘Alternatives to Austerity: A Human Rights Framework for Economic Recovery’ in Aoife Nolan et al. (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 23–56, 31.

<sup>980</sup> Edmiston (n 936) 265.

<sup>981</sup> Vassilopoulou and others (n 886) 12.

<sup>982</sup> Edmiston (n 936) 265.

because these groups have been the ones most directly affected by austerity cuts whilst at the same time these groups have had to take on ‘new and novel responsibilities’ in order to get by.<sup>983</sup> Thus the level of benefits, and the social protection this provides, have been cut whilst at the same time the services which might once have mitigated the effects of such cuts have also seen funding reduced.<sup>984</sup> Consequently, individuals are unable to access the services they would ordinarily rely on to mitigate the effects of low income<sup>985</sup> ‘at the point when they have needed them the most.’<sup>986</sup> More so, the adverse effects of austerity policies have been disproportionately burdened by women.<sup>987</sup> This in part due to the increased vulnerability to the detrimental effects of cuts to social services faced by women ‘due to multiple forms of entrenched discrimination.’<sup>988</sup> This is because women are more concentrated in public sector jobs, are hit the hardest by cuts they rely upon, and are left to fill the gaps which the cuts create.<sup>989</sup>

Austerity has inherent implications for people’s health which are both direct and indirect in nature.<sup>990</sup> Austerity measures cause, or at the least contribute towards, reduced food consumption, homelessness ‘and stress-related illnesses, particularly anxiety, depression and suicide.’<sup>991</sup> These stress related illnesses can not only be compounded by social anxieties fuelled by an inability to return to pre-austerity standards of living<sup>992</sup> but also by the judgmental

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<sup>983</sup> Strong (n 864) 4.

<sup>984</sup> Sepúlveda Carmona (n 979) 35; Wills and Warwick (n 882) 660.

<sup>985</sup> Rose and McAuley (n 883) 139.

<sup>986</sup> Strong (n 864) 3.

<sup>987</sup> Housos (n 905) 428; Sepúlveda Carmona (n 979) 35; Bell and Cemlyn (n 47) 826; Craddock (n 927) 80.

<sup>988</sup> Sepúlveda Carmona (n 979) 32.

<sup>989</sup> *ibid.*

<sup>990</sup> Ruckert and Labonté (n 873) 307.

<sup>991</sup> Oette (n 326) 675.

<sup>992</sup> Maria Pentaraki, “‘I Am in a Constant State of Insecurity Trying to Make Ends Meet, like Our Service Users’: Shared Austerity Reality between Social Workers and Service Users—Towards a Preliminary Conceptualisation’ (2017) 47 *British Journal of Social Work* 1245, 1255.

attitude shown towards the impoverished as a result of the ‘benefit scrounger’ narrative.<sup>993</sup> As such ‘welfare cuts can in many instances be shown to have contributed to, or aggravated, adverse health consequences’<sup>994</sup> whilst at the same time negatively affecting ‘the use of healthcare services.’<sup>995</sup>

This not only affects people’s physical health but also has implications for their mental health which in turn can further diminish their physical health. Increased conditionality has been linked to adverse mental health implications<sup>996</sup> and austerity induced economic hardships have been evidenced to have ‘accumulated or acted as a ‘final straw’ to trigger self-harm.’<sup>997</sup> More so, a strong correlation exists between economic crises, austerity and suicide.<sup>998</sup> With, albeit disputed, links being drawn between welfare conditionality and several suicides.<sup>999</sup> For example, 66.4% of Employment and Support Allowance (ESA) recipients had had suicidal thoughts whilst 43.2% of ESA recipients had attempted suicide as opposed to 21.7% and 6.7% respectively in the general population.<sup>1000</sup> However, ‘death in relation to austerity doesn’t occur solely through suicide.’<sup>1001</sup> The above paragraphs demonstrate that austerity diminishes the initial health of individuals’ whilst at the same time diminishing health care provision. These twin contentions can be used in supporting the argument that austerity has contributed to excess

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<sup>993</sup> Garthwaite and Bambra (n 934) 274.

<sup>994</sup> Oette (n 326) 675.

<sup>995</sup> Ioanna Keramidou and Loukas Triantafyllopoulos, ‘The Impact of the Financial Crisis and Austerity Policies on the Service Quality of Public Hospitals in Greece’ (2018) 122 *Health Policy* 352, 356.

<sup>996</sup> Garthwaite and Bambra (n 934) 269.

<sup>997</sup> *ibid.*

<sup>998</sup> Grover, ‘Violent Proletarianisation: Social Murder, the Reserve Army of Labour and Social Security “Austerity” in Britain’ (n 939) 11.

<sup>999</sup> Oette (n 326) 691.

<sup>1000</sup> Grover, ‘Violent Proletarianisation: Social Murder, the Reserve Army of Labour and Social Security “Austerity” in Britain’ (n 939) 11. ESA is a benefit designed to provide money to help with living costs for people with limited capability to work

<sup>1001</sup> Mills (n 948) 303.

mortality with findings suggesting that austerity in England has been linked to 120,000 excess deaths between 2010 and 2017.<sup>1002</sup>

Building upon such reasoning, Grover has argued that changes to social security provision in the UK since 2010 has constituted social murder<sup>1003</sup> and along a similar vein I have, elsewhere, explored the potential for such austerity influenced policies to be considered as crimes against humanity.<sup>1004</sup> This is especially so given the findings of the CRPD that the UK's impact assessments 'prior to the implementation of several measures of its welfare reform expressly foresaw an adverse impact on persons with disabilities'<sup>1005</sup> and the CRPD's view that 'there is reliable evidence that the threshold of grave or systematic violations of the rights of persons with disabilities has been met in the State party.'<sup>1006</sup>

## **5.6. Austerity in the United Kingdom Since 2010 as Inherently Destitution Inducing**

These policies - and in fact the austerity project in the UK since 2010 as a whole – were envisioned to be supplemented by the idea of the 'Big Society'. The big society was envisioned to fill the void left by the retreating state. As part of the Conservative Party's election platform in the 2010 General Election, the idea of the Big society 'became a central plank'<sup>1007</sup> and 'guiding principle'<sup>1008</sup> of the coalition government's policies following that election. Ishkanian

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<sup>1002</sup> Jonathan Watkins et al., 'Effects of Health and Social Care Spending Constraints on Mortality in England: A Time Trend Analysis' [2017] *BMJ Open* 6 <<https://bmjopen.bmj.com/content/bmjopen/7/11/e017722.full.pdf>>.

<sup>1003</sup> Grover, 'Violent Proletarianisation: Social Murder, the Reserve Army of Labour and Social Security "Austerity" in Britain' (n 939) 13.

<sup>1004</sup> Graham (n 946).

<sup>1005</sup> Committee on the Rights of Persons with Disabilities CRPD, 'Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland Carried out by the Committee under Article 6 of the Optional Protocol to the Convention' (United Nations 2016) CRPD/C/15/R.2/Rev.1 para 113 (c).

<sup>1006</sup> *ibid* 113.

<sup>1007</sup> Armine Ishkanian, 'Neoliberalism and Violence: The Big Society and the Changing Politics of Domestic Violence in England' (2014) 34 *Critical Social Policy* 333, 334.

<sup>1008</sup> Tony Manzi, 'The Big Society and the Conjunction of Crises: Justifying Welfare Reform and Undermining Social Housing' (2015) 32 *Housing, Theory and Society* 9, 9.

argues that the Big Society project should be understood ‘as a neoliberal type of policy’<sup>1009</sup> underpinned, Kisby argues, by the implicit idea ‘that the state is bad and almost anything else—the free market, charities, volunteers—is better.’<sup>1010</sup> A conjoined-twin to the austerity undertaken in 2010, the Big Society was an attempt to ‘roll- back the state and encourage citizens to take responsibility, via community and voluntary groups, for provision of public services at a local level.’<sup>1011</sup> Thus, the delivery of public services by ‘charities and the voluntary sector’<sup>1012</sup> was to be promoted.

One justification for this was that it would shift power to a more local level allowing individuals and communities ‘to take decisions and solve problems themselves.’<sup>1013</sup> Thus, the state has been replaced as the provider of some services and the local level replacement of state provision ‘by volunteer-led groups with reduced funding has been termed ‘austerity localism.’’<sup>1014</sup> This placed ‘great emphasis’<sup>1015</sup> on ‘charitable tradition’<sup>1016</sup> and necessitated ‘nurturing people’s altruism, generosity of time and spirit.’<sup>1017</sup> As such, the idea of the Big Society was, amongst other factors, ‘based on extensive use of voluntary sector provision’<sup>1018</sup> which was to develop a greater role than it had previously had.<sup>1019</sup> This resulted in third sector organisations taking ‘on a growing share of services previously delivered through statutory

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<sup>1009</sup> Ishkanian (n 1007) 334.

<sup>1010</sup> Ben Kisby, ‘The Big Society: Power to the People?’ (2010) 81 *The Political Quarterly* 484, 485.

<sup>1011</sup> Lindsay Findlay-King et al., ‘Localism and the Big Society: The Asset Transfer of Leisure Centres and Libraries – Fighting Closures or Empowering Communities?’ (2018) 37 *Leisure Studies* 158, 158.

<sup>1012</sup> Kathy Evans, ‘Big Society in the UK: A Policy Review’ (2011) 25 *Children & Society* 164, 165.

<sup>1013</sup> Fiona Wilson and Don Maclean, ‘The Big Society, Values and Co-Operation’ (2012) 26 *Work, Employment and Society* 531, 531.

<sup>1014</sup> Findlay-King et al. (n 1011) 158–159.

<sup>1015</sup> Evans (n 1012) 164.

<sup>1016</sup> *ibid.*

<sup>1017</sup> *ibid* 165.

<sup>1018</sup> Manzi (n 1008) 9.

<sup>1019</sup> Martin Smith and Rhonda Jones, ‘From Big Society to Small State: Conservatism and the Privatisation of Government’ (2015) 10 *British Politics* 226, 244.

agencies.’<sup>1020</sup> This has been deemed, by some, to have offered to recast the ‘relationship between public sector and ‘third sector’ of voluntary, community and neighbourhood organizations’<sup>1021</sup> in order to change the balance between the public and the private sectors.<sup>1022</sup> However, for others this represents a reliance on ‘volunteerism to hide the failed state.’<sup>1023</sup>

This reliance on volunteerism and charity, which I term charitable assistance, can be criticised in it fails to prioritise actual service need which, Evans contends, risks a postcode lottery and ‘wide local variations in volume, focus and quality of support services’<sup>1024</sup> determined by the ‘availability and generosity of local residents.’<sup>1025</sup> As well as this, this relied upon the assumption that third sector and civil society organisations could ‘recruit and motivate volunteers.’<sup>1026</sup> However, some communities would lack individuals with the interests, time, motivation, and capacity to allow for adequate services to be provided.

Although the idea of the Big Society was prominent between 2010 and 2015 it ‘did not succeed or endure and was barely mentioned in the 2015 general election.’<sup>1027</sup> Despite this, I contend that it succeeded in recasting the relationship between the provision of public services and charitable assistance providers. This lasting recasting has resulted in, what I contend to be, societal structures which are inherently destitution inducing. This is because, inherent to traditional conceptions of destitution, as explored in chapter 2.2. and chapter 3.4., is a need to rely on charitable assistance. Central to the idea of the Big Society is to replace the provision

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<sup>1020</sup> Linda Milbourne and Mike Cushman, ‘From the Third Sector to the Big Society: How Changing UK Government Policies Have Eroded Third Sector Trust’ (2013) 24 *Voluntas* 485, 487.

<sup>1021</sup> John Fenwick and Jane Gibbon, ‘The Rise and Fall of the Big Society in the UK’ (2017) 37 *Public Money & Management* 126, 126.

<sup>1022</sup> Findlay-King et al. (n 1011) 159.

<sup>1023</sup> *ibid.*

<sup>1024</sup> Evans (n 1012) 167.

<sup>1025</sup> *ibid.*

<sup>1026</sup> *ibid* 166.

<sup>1027</sup> Fenwick and Gibbon (n 1021) 126.



of public services with charitable assistance. Thus, as the Big Society was designed to foster a use of charitable assistance – where once the state provided – it is, I contend, inherently destitution inducing under the traditional definition, the JRF definition, and my human rights-based definition of destitution. This notion can be further illustrated with the contention that ‘it is difficult to dispute Webster’s conclusion that the sanctions regime is “designed to reduce people ... to complete destitution” given that single adult jobseekers without dependants could be left with zero income after housing costs for periods of up to three years for repeat failures’.<sup>1028</sup>

Not only this, but a reliance on charitable assistance to realise human rights is, I have argued above, not compatible with human rights standards.<sup>1029</sup> This is because it takes away the entitlement element of the right and removes the possibility for individuals to make a legitimate claim if the charity provider fails to provide adequately. In the following chapter I will elaborate upon this point in my analysis of the normative content of the component rights in the UK.<sup>1030</sup> Consequently, even if it is not accepted that a reliance on charitable assistance is indicative of destitution more broadly understood, it follows that a reliance on charitable assistance is not compatible with my human rights-based destitution definition. I therefore contend that austerity, as envisioned, designed, and implemented in the UK since 2010, has been inherently destitution inducing under my definition for those who have come to rely - as a consequence of austerity twinned with Big Society policies - on charitable assistance to access the physical substance of the component rights.

## **5.7. Concluding Remarks**

This chapter has traced the last decade of austerity within the UK including its justifications

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<sup>1028</sup> Simpson, McKeever and Gray (n 84) 24.

<sup>1029</sup> See chapter 2.2.

<sup>1030</sup> See chapter 6.3.

and its effects. More so, I have explicitly argued that austerity in the UK since 2010, by being designed to foster a reliance on charitable assistance, has been inherently destitution-inducing. The implications of this are numerous. However, given that this thesis defines destitution from a human rights-based perspective the most pertinent of these is that this recasts destitution in the UK as a failure to realise ESCRs caused by government policy. It therefore follows that alternative government policies can work to address destitution. Considering this reasoning alongside the work of Griffiths and Kippin, who argue that even when the need for austerity is accepted ‘several options are available—as the differing responses to post-austerity policy around the globe show,’<sup>1031</sup> it can be contended that this destitution definition can be used to inform future austerity policies.

Thus, it can be reasonably imputed from the analysis within this chapter that austerity has a range of implications for destitution within the UK; both for the realisation of the component rights and for the attainment of the destitution threshold. Having set the context from which these elements must be understood within the UK, in chapter 6 I will evaluate destitution in the UK. This is achieved by determining what the destitution experience entails in the UK. Following this, in chapter 7, I offer recommendations for addressing destitution in the UK.

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<sup>1031</sup> Griffiths and Kippin (n 977) 417.

## Chapter 6: Destitution in the United Kingdom from a Human Rights Perspective

### 6.1. Introduction

This chapter will apply the human rights-based definition of destitution outlined in part one of this thesis to the context of the United Kingdom (UK). In order to do this the twin elements of this definition must be contextualised into the UK. Given that I have contended that the highlighted *component rights* are universally applicable in defining destitution from a human rights-based perspective, the focus of this chapter will be the second element of my definition: *the destitution threshold*. Given that what amounts to destitution varies between the context of states, under my definition, it is the destitution threshold which differentiates what constitutes destitution between contexts. Although the component rights are universally applicable, it is the level of realisation of these component rights which determine an individual to be destitute. Thus, this chapter will consider and assess the means and levels of realisation of the component rights in the UK.

Clearly, therefore, the purpose of this chapter is to determine the context specific destitution threshold of each individual component right within the context of the United Kingdom. As was made clear in chapter 3.2., an individual will be deemed destitute under my human rights-based definition of destitution if one or more of the component rights is not met to the destitution threshold. Consequently, there is no need to consider the component rights as having a composite nature within my definition. However, as the analysis below will make expressly clear, it is often the case that, in the UK the realisation of any one component right to the level of destitution threshold is, in practice, dependent on at least one of the other component rights also being met to the level of the destitution threshold. In the UK, if one component right is not met up to the level of the destitution threshold it is almost certainly the

case that the same is true of other component rights. Although this is often the case in other states, the focus of this thesis is the UK and, *in the context of the UK*, there exists a strong interrelationship between the realisation of the component rights. For example, the Right to an Adequate Standard of Living cannot be realised to the appropriate levels to avoid destitution whilst at the same time its constituent parts, the rights to housing, water, sanitation, food, and clothing remain unrealised to those same levels. Not only this but, in the UK, socially acceptable access to water and sanitation is intimately linked to housing. Water, in turn, is required to clean and prepare food, to clean clothes, and to clean the home whilst the home in turn provides a place to store clothing and food and also a place to prepare food safely and securely.

As will be recapped in the following section, it was established in chapter 3 that the destitution threshold is made up of the minimum core obligation supplemented with a second standard of obligation.<sup>1032</sup> Given the supplementary nature of this second standard, the destitution threshold will always be at least equal to, if not greater than, and never less than the minimum core obligation. The minimum core obligation, as I have demonstrated in chapter 3, is representative of the destitution theme of survival needs. However, I have argued that the minimum standards with respect to freedom from vulnerability and indignity require that the correlative minimum core content of the component rights is realised without reliance on charitable assistance. Thus, the supplementary – contextually specific - standard of obligation must go beyond this minimum requirement with respect to vulnerability and indignity to be informed by a contextually appropriate understanding of vulnerability and indignity.<sup>1033</sup>

As survival needs are universal in nature, an analysis of the normative content of the component rights can aid in determining what constitutes dignified realisation free from

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<sup>1032</sup> See chapter 3.2.

<sup>1033</sup> See chapter 2.4.2. and chapter 2.4.3.

vulnerability. In determining the standard of realisation which constitutes the destitution threshold for each component right, it is therefore crucial to consider the extent to which the substance of each component right is available, affordable, accessible, acceptable, and of sufficient quality. The consideration of the normative content alongside the destitution themes of indignity and vulnerability can be justified for two main reasons. Firstly, because it is by using these destitution themes that the analysis will remain specific to destitution. Secondly, as will be argued below, the destitution themes of dignity and vulnerability overlap with aspects of the normative content in a multitude of ways.

This chapter will firstly establish that the supplementary standard aspect of the destitution threshold is, in the UK, greater than zero. That means, therefore, that in the equation given in figure 4 the UK's destitution threshold – that is the level of rights realisation to be achieved without reliance on charitable assistance - is more than the minimum core obligation. Following this, the normative content will be explored with a section assigned to each of the five elements of AAAAQ. For each aspect of the normative content, the section will explore what that means in the UK context by reference to the (non)realisation of various component rights. Following this, the destitution threshold for each component right will be established before this chapter concludes by establishing a working-human-rights-based definition of destitution which is applicable to the UK context.

## **6.2. The Level of Realisation Required to Meet the Destitution Threshold in the UK as Greater than the Minimum Core**

The minimum core obligation was given detailed attention in chapter 3 of this thesis. In the section addressing criticisms of the 'Minimum Core Obligation Approach' it was highlighted that the approach may not be appropriate in the context of economically developed nations and

I reaffirm this argument here.<sup>1034</sup> It is important to be clear and explicit in this regard. If, in the United Kingdom, an individual's component rights are realised only to the level of the minimum core obligation that individual is destitute under my definition. More so, an individual is destitute if the component rights are realised only by a reliance on charitable assistance.

Therefore, using the model set out in chapter 4 which is represented by figure 4, the universal element of the destitution threshold must be supplemented in order to determine the UK's destitution threshold. The remainder of this chapter will work towards completing this supplementation. This will be achieved by contextualising the destitution themes in analysing the means and levels of realisation of the component rights. The themes of survival needs, vulnerability, and indignity are representative of the destitution experience. As such they can guide the determination of the UK's destitution threshold.

For my purposes, survival needs constitute the level of realisation of each of the component rights required in order to ensure human survival. In considering *only* the component rights I argue that these survival needs are universal in nature. Given that the minimum core obligation is representative of survival needs, the theme of survival needs is encapsulated into the human rights-based destitution threshold from the outset. This is given the place of the minimum core obligation as the base from which the destitution threshold is determined. The second requirement of the universal destitution threshold baseline is that there is no reliance on charitable assistance. Based upon my examination of existing conceptions of destitution it is clear that this is a defining feature of destitution. The requirement that there is no reliance on charitable assistance to realise the component rights is, I argue, representative of a minimum universal standard with regard to the destitution themes of vulnerability and

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<sup>1034</sup> See chapter 3.3.1.1

indignity.

This notion of considering a minimum standard with respect to vulnerability and dignity as part of the universal destitution threshold baseline can be supported in considering Graham's conception of the minimum essential level of the realisation of the right to social security allowing for 'survival with dignity.'<sup>1035</sup> Thus, under my rights-based definition of destitution, the universal destitution threshold – that is the minimum threshold below which an individual is considered destitute – is comprised of two requirements: firstly, realisation of the minimum core obligation and, secondly, the requirement that there is no reliance on charitable assistance to realise the component rights. This first element is representative of survival needs and the most minimal standards with respect to the destitution themes of vulnerability and dignity. This baseline destitution threshold must, however, be supplemented in order to ensure contextual relevance. This is because, beyond the most minimal standards with respect to vulnerability and indignity, which pertain to avoiding a reliance on charitable assistance, vulnerability and indignity may have different manifestations in different contexts.

As such the supplementary level of obligation, as the aspect of the destitution threshold which allows the destitution threshold to be contextualised, must be informed by the remaining destitution themes: vulnerability and indignity. These three themes were explored in greater detail in chapter 2 and an in-depth exploration need not be repeated here. Concisely, however, each of these themes can be summarised for my purposes here. Survival needs are those needs which must be met in order to subsist and, as my analysis in part one made clear, *for my purposes* these survival needs are the physical substance of the component rights of my definition. The theme of vulnerability encapsulates the notion of precariousness yet also goes beyond this to include implications for physical security. Indignity, as I stressed in part one, is

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<sup>1035</sup> Graham (n 826) 132.

a contested concept. However, the destitution theme of indignity has a plethora of faces with implications for autonomy, connotations of stigma, and precariousness. As is clear from this, the context-sensitive themes of vulnerability and indignity can be broadly interpreted. As such, they give great scope for ensuring that context specificity is central to my human rights-based definition of destitution. This is because both vulnerability and dignity may mean different things in different contexts. The broadness of these concepts can, however, be narrowed when these rights are considered jointly alongside, firstly, the AAAAQ framework and, secondly, the *de facto* realisation of the component rights in context.

### **6.3. The Normative Content of the Component Rights in the UK**

#### **6.3.1. Availability**

In terms of the normative content of the component rights, availability means that the substance of the right is available for use and/or consumption. For example, in relation to food aid, availability relates to the ability of food aid providers to source food which may be impacted by a range of logistical barriers.<sup>1036</sup> It follows that availability relates to the ability to source the resource, in this example food, which is the substance of the right, in this instance the right to food. In relation to the component rights, this means that there is food, water, sanitation, housing, and clothing of sufficient quality which, although it may not be any combination of accessible, affordable, or acceptable, exists.

In the context of the UK, it is plain that the physical substance of the component rights does indeed have the potential to be made available. There exist empty homes, food in abundance, a well-established water and sanitation network, clothing aplenty, and a system of social security. Together, the potential availability of these resources has the potential to ensure that every individual has an adequate standard of living. However, this potential is not

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<sup>1036</sup> See chapter 3.2.



realised, and individuals go without sufficient access to these necessities. Thus, it is clear that despite the physical substance of the component rights existing and as such being potentially available other barriers exist to the realisation of the component rights to sufficient levels and as such these resources are not always available to individuals to allow the enjoyment of rights.

One such barrier is affordability which may result in individuals relying upon charitable assistance such as food aid. Even if my contention that an individual is destitute if they rely on charitable assistance in attaining the physical substance of a component right is refuted, a reliance on charitable assistance can still be criticised from a human rights-based perspective in considering the normative framework. For example, food aid providers, who will be utilised as an example throughout this chapter, face issues of availability as they are constrained by the structure of the food system in making food available.<sup>1037</sup> This is because, linking to the discussion of vulnerability above<sup>1038</sup> there may come a point when food aid providers are unable to acquire food and this has been noted as occurring at food banks in a number of developed nations.<sup>1039</sup> If such providers are unable to acquire new food, and the old food they have available is dispensed there will come a point when these providers have no food left to distribute. Thus, under right to food standards ‘the availability of food within these systems is not sustainable.’<sup>1040</sup> The same reasoning can be applied to the realisation of any of the component rights which rests upon charitable assistance. Consequently, despite resources being available in the structure of the system as a whole, potential barriers to accessing food for both individuals as well as charitable assistance providers exist. This poses an issue as if a resource becomes unavailable to charitable assistance providers that same resource consequently

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<sup>1037</sup> Hannah Lambie-Mumford, *Hungry Britain: The Rise of Food Charity* (Policy Press 2017) 92.

<sup>1038</sup> See Chapter 2.4.2.

<sup>1039</sup> Tiina Silvasti and Graham Riches, ‘Hunger and Food Charity in Rich Societies: What Hope for the Right to Food’ in Graham Riches and Tiina Silvasti (eds), *First World Hunger revisited: Food charity or the Right to Food?* (Palgrave Macmillan 2014) 191–208, 203.

<sup>1040</sup> Lambie-Mumford (n 1037) 92.

becomes unavailable to those who are reliant upon the charitable assistance system to attain those resources.

This is indicative of the interrelationship between the various aspects of the AAAAQ framework. Using the example of social housing, I contend that a lack of availability can lead to a lack of affordability. In regard to housing, at the same time as there being an abundance there also exists an insufficient supply of ‘social housing to house those who desperately need it.’<sup>1041</sup> As social housing is more affordable than ‘increasingly expensive private rented accommodation’<sup>1042</sup> it follows that a lack (non-availability) of more affordable social housing results in housing being less affordable.

### **6.3.2. Affordability**

In the UK there is a reliance on the market in order to provide access to the resources required to ensure the realisation of the component rights. For example, Lambie-Mumford states that ‘in the UK, approaches to ensuring everyone has access to healthy food has been left to the operation of markets, consumer choice and a social welfare system which is meant to enable those lacking employment to be able to purchase food.’<sup>1043</sup> This demonstrates the importance of the right to social security and its links to the realisation of the right to food and, I argue other, component rights. More so, this has resulted in a policy void in respect to food insecurity within the UK. This policy void exists because realisation of the right to food has been left to market forces.<sup>1044</sup> Riches and Silvasti contend that this constitutes a displacement of the *right*

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<sup>1041</sup> Anna Clark et al., ‘Poverty, Evictions and Forced Moves’ (Joseph Rowntree Foundation 2017) 4 <<https://www.jrf.org.uk/file/50255/download?token=aztxHCb6&filetype=full-report>> accessed 6 February 2020.

<sup>1042</sup> Bone (n 602) s 2.4.2.

<sup>1043</sup> Hannah Lambie-Mumford, ‘The Growth of Food Banks in Britain and What They Mean for Social Policy’ (2019) 39 Critical Social Policy 3, 7–8.

<sup>1044</sup> *ibid* 22–23.

to food by a need to buy food in the market.<sup>1045</sup> This supposed displacement can be aligned within the AAAAQ framework provided that sufficient and acceptable food remains affordable and as such accessible. However, ‘more and more people who are living in advanced industrial societies simply cannot afford to buy their food normally in the marketplace.’<sup>1046</sup> This has implications for the affordability and accessibility of food.<sup>1047</sup>

This reasoning can be extrapolated and applied to the remaining component rights – with the exclusion of the right to social security – to state that the realisation of the component rights in the UK has been left to market forces with the role of social security being envisioned to ensure that people have the financial means to engage with the market. This necessarily grants prominence to the concept of affordability. An individual with sufficient financial means can afford to access housing, clothing, food, water and sanitation which is both acceptable and of sufficient quality. This is because they will use their financial means to buy food and clothing as well as rent or purchase a home which in turn will allow access to: water and sanitation; the means to store and prepare food; and the means to store and clean clothing. However, an individual without such financial means, for whatever reason, will be unable to afford to acquire these resources through the market. Thus, (un)affordability acts as a barrier to accessing the resources required to realise the component rights. It follows that one aspect of the destitution threshold in the UK is that the resources required to realise the component rights, that is the physical substance of the rights, are affordable.

Affordability is multi-faceted. This is because affordability necessitates an analysis of

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<sup>1045</sup> Graham Riches and Tiina Silvasti, ‘Hunger in the Rich World: Food Aid and Right to Food Perspectives’ in Graham Riches and Tiina Silvasti (eds), *First World Hunger revisited: Food charity or the Right to Food?* (Palgrave Macmillan 2014) 9.

<sup>1046</sup> *ibid* 5.

<sup>1047</sup> HRW, ‘Nothing Left in the Cupboards: Austerity, Welfare Cuts, and the Right to Food in the UK’ (Human Rights Watch 2019) 15–16 <[https://www.hrw.org/sites/default/files/report\\_pdf/uk0519\\_web3.pdf](https://www.hrw.org/sites/default/files/report_pdf/uk0519_web3.pdf)> accessed 17 June 2019.

an individual's income alongside the cost of accessing, for my purposes, the resources which align to the various component rights. Although I have already highlighted that income-based determinations of poverty, and consequently destitution, are not appropriate in determining a human-rights based definition of destitution: affordability is fundamentally about income. As such the Joseph Rowntree Foundation minimum income standard approach offers an existing model by which to determine that which is affordable in the UK. More so, despite being relevant to the poverty, and consequently the destitution, discourse the minimum income standard 'does not claim to be a poverty threshold.'<sup>1048</sup> The minimum income standard is instead portrayed as the standard of living deemed to be acceptable by members of the public.<sup>1049</sup> This is because some individuals may attain an acceptable standard of living despite being below the minimum income standard whilst others, for example those who face additional needs due to 'living in a remote location or having a disability', may not be able to attain an acceptable standard of living despite having an income level above the minimum income standard.<sup>1050</sup> This standard of living goes beyond food, clothes, and shelter to also include ensuring that individuals have what they need to 'have the opportunities and choices necessary to participate in society.'<sup>1051</sup> The minimum income standard is the level of income required to cover needs and necessities as opposed to wants and luxuries and as such it is informed by identifying things that everybody should be able to afford.<sup>1052</sup>

Although similar to a shopping basket approach, by which an income figure is arrived at by adding up the cost of a basket of essential goods, the minimum income standard is more

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<sup>1048</sup> Padley and Hirsch (n 122) 4.

<sup>1049</sup> *ibid.*

<sup>1050</sup> *ibid.*

<sup>1051</sup> *ibid* 3.

<sup>1052</sup> *ibid* 4.

generous than such a shopping basket approach.<sup>1053</sup> Padley and Hirsch find that a single person requires £17,900 whereas a couple with children require £20,400 each in pre-tax annual income in order to attain the minimum income standard. These figures are ‘substantially’ above the official poverty line in the UK.<sup>1054</sup>

This suggests that there is a disconnect between what the UK government regards as poverty and what the UK public regard as being an acceptable standard of living. This contention can be supported by comparing these figures to wages and benefits in order to assess the adequacy of these respectively.<sup>1055</sup> As is made clear by figure 5.1, the minimum wage in the UK provides an income which is, I contend substantially, below that of the minimum income standard.

Figure 5.1 demonstrates that the national minimum wage, even for those aged 25 and over who are entitled to a higher rate of pay, does not reach the minimum income standard. This is evidenced further by Dowler’s suggestion that ‘social security benefits and the National Minimum Wage are falling further behind actual costs of food and other necessities as well as average income.’<sup>1056</sup> As such despite how carefully individuals manage their finances, ‘research has regularly shown that those on benefits or the statutory minimum wage have insufficient money to buy the food they need for health.’<sup>1057</sup> These observations demonstrate that work does not guarantee freedom from poverty.<sup>1058</sup> More so, it is observed that the minimum income standard figures are from 2017 whereas the minimum hourly wage figure

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<sup>1053</sup> Sam Royston, *Broken Benefits* (Policy Press 2017) 27.

<sup>1054</sup> Padley and Hirsch (n 122) 10.

<sup>1055</sup> *ibid* 1.

<sup>1056</sup> Elizabeth Dowler, ‘Food Banks and Food Justice in “Austerity Britain”’ in Graham Riches and Tiina Silvasti (eds), *First World Hunger revisited: Food charity or the Right to Food?* (Palgrave Macmillan 2014) 160–175, 165.

<sup>1057</sup> Kayleigh Garthwaite, *Hunger Pains: Life Inside Foodbank Britain* (Policy Press 2016) 123.

<sup>1058</sup> Alston, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the United Kingdom of Great Britain and Northern Ireland’ (n 5) para 18.

are from 2019. As the minimum wage has increased between 2017 and 2019 this suggests that the gap between the minimum income standard and the income derived from employment on minimum wage is even greater than presented here.

**Figure 5.1: Comparing the Minimum Wage with the Minimum Income Standard (MIS)<sup>1059</sup>**

Age Range	25 and over	21 to 24	18 to 20	Under 18	Apprentice
Minimum Hourly Wage: April 2019	<b>£8.21</b>	<b>£7.70</b>	<b>£6.15</b>	<b>£4.35</b>	<b>£3.90</b>
Annual Wage: Minimum Hourly wage x 40 x 52	£17,076.80	£16,016	£12,792	£9,048	£8,112
Deviance from the MIS for a Single Person (£17,400)	-£823.20	-£1,884	-£5,108	-£8,852	-£9,788
Deviance from the MIS for a Same Age Couple with Children (£20,400 pp for a total of £40,800)	-£6,646.40	-£8,768	-£15,216	-£22,704	-£24,576

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<sup>1059</sup> The hourly rates of pay change every April. These Figures are from April 2019 and are taken from the UK Government website. The annual wage row is of my own working and has been calculated by multiplying the hourly rate by 40 (hours per week) and then multiplying this by 52 (the number of weeks in the year). The deviance has been calculated by subtracting the MIS from the annual wage. UK Government 'National Minimum Wage and National Living Wage rates' < <https://www.gov.uk/national-minimum-wage-rates> > accessed 25<sup>th</sup> September 2019

**Figure 5.2. Comparing Benefit Entitlement for a Singleton Over the Age of 25<sup>1060</sup> with the Minimum Wage and the Minimum Income Standard (MIS)<sup>1061</sup>**

Income level	Weekly	Monthly	Annual
Universal Credit Standard Allowance (UCSA) <sup>1062</sup>	£94.59	<b>£409.89</b>	£4918.68
Housing Costs Allowance (HCA) <sup>1063</sup>	<b>£90.90</b>	£393.90	£4726.80
Total allowance = UCSA + HCA	£185.49	£803.79	£9645.48
Deviance from Minimum wage of Total Allowance	-£142.91	-£619.28	-£7431.32
Deviance from MIS of Total Allowance	-£149.12	-£646.17	-£7754

Despite the fact that wages at the lower end of the employment market are, upon this

<sup>1060</sup> Given that single individuals over the age of 25 have the lowest deviance from the Minimum Income Standard (see figure 5.1) I have elected to use this category of individuals when comparing the data in figure 5.1 with benefit entitlements. The data in figure 5.2 shows that even this group who fare relatively better in the comparison between minimum wage and the minimum income standard do not receive an income from benefits which is in anyway comparable to the incomes in figure 5.1. This suggests that the other categories of individuals from figure 5.1. fare equally less well.

<sup>1061</sup> Numbers in bold are those taken from the government webpages. The other values are of my own working and are determined by either i) dividing the annual figure by 52 (for a weekly figure) or by 12 (for a monthly figure) or ii) multiplying the weekly figure by 52 or the monthly figure by 12

<sup>1062</sup> This UCSA monthly allowance is taken from the government website. ‘Universal Credit’ (GOV.UK) <<https://www.gov.uk/universal-credit/what-youll-get>> accessed 21 April 2020.

<sup>1063</sup> Individuals in receipt of Universal Credit may be eligible for Housing Support Allowance ‘Housing Costs and Universal Credit’ (GOV.UK) <<https://www.gov.uk/housing-and-universal-credit/renting-from-private-landlord>> accessed 21 April 2020; The housing support entitlement is determined by reference to Local Housing Allowance (LHA) Rates. The level of this rate varies by location. For indicative use, I have chosen to use LHA rates from my hometown. As of 21/04/2020 the LHA for my postcode, which is in the Oldham and Rochdale Broad Rental Market Area (BRMA), is £90.90 per week if the claimant is entitled to 1 bedroom or is £66.39 per week if the claimant is entitled to shared accommodation. As this data is presented indicatively, I will use the higher figure of £90.90 per week. Direct Gov, ‘Local Housing Allowance Rates Calculator’ <<https://lha-direct.voa.gov.uk/search.aspx>> accessed 21 April 2020; In 2016, my hometown Oldham was found to be the Most Deprived town in England by the Office of National Statistics. Combined with the fact that the focus of this thesis is destitution and given that this data is presented indicatively, I believe that my use of the Oldham figure is justified. “‘Most Deprived’ Towns and Cities Named’ *BBC News* (18 March 2016) <<https://www.bbc.com/news/uk-england-35842488>> accessed 21 April 2020.

analysis, clearly insufficient, the coalition government which came to power in 2010 ‘linked benefit adequacy with wages; repeatedly stating that people should be better off in work than on benefits.’<sup>1064</sup> Grover highlights that the centrality of such sentiments rests upon ‘perceived consequences of people receiving financial relief at a level comparable with wages for the poorest paid labourers.’<sup>1065</sup> In order to avoid these perceived consequences there is a reliance upon the misguided notion that ‘people must be kept in poverty if they are workless to ensure that they are incentivised to take wage work when it is available.’<sup>1066</sup> Thus social security policy has not been designed with the question of how much is enough in mind and this question has been a secondary consideration.<sup>1067</sup>

As such, welfare payments have risen at a rate below inflation.<sup>1068</sup> This means that welfare payments are well below the minimum income standard.<sup>1069</sup> Thus, the social security system has been deliberately designed to ensure that those who are able to work – but do not for whatever reason – are worse off than those in minimum wage. On account of this, given that the minimum wage does not meet the minimum income standard, the adequacy of benefits must also be called into question. This is because the level of benefit provision has been designed to be at a lower level of income than can be achieved in minimum wage work. If minimum wage work does not allow for people to meet the minimum income standard, it follows that benefit provision does not meet the minimum income standard. This directly links

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<sup>1064</sup> Graham (n 826) 173.

<sup>1065</sup> Chris Grover, ‘Employment and Support Allowance, the “Summer Budget” and Less Eligible Disabled People’ (2015) 30 *Disability & Society* 1573, 1574.

<sup>1066</sup> *ibid* 1576.

<sup>1067</sup> Walker (n 193) 56.

<sup>1068</sup> Oette (n 326) 673.

<sup>1069</sup> Padley and Hirsch (n 122) 1 highlight that of those on out of work benefits ‘a single, working-age person, receiving these benefits, has just 36% of what they need, while a couple with two children has 59% of what they need.’.



to my analysis of austerity in the UK since 2010 as being destitution inducing.<sup>1070</sup>

Clearly, therefore, the right to social security is of particular pertinence here as this right is supposed to protect people from losing access to such necessities due to issues of unaffordability. However, I contend that the current social security system in the UK fails to ensure that individuals can afford to access the resources required to ensure that their component rights are realised to the destitution threshold. This is because social security has been targeted for austerity savings in a number of ways. For example, a four-year freeze preventing the rise of benefits has been a social security related measure. This freeze is expected to be the ‘biggest policy driver behind the expected rise in poverty’ between the November 2017 Budget and 2020/21.’<sup>1071</sup> This has been labelled a hidden cut<sup>1072</sup> to social security as although the amount of cash in recipients’ pockets will stay the same the amount they will be able to afford with that amount of money has reduced.<sup>1073</sup>

From this I contend that welfare payments in the UK are not at a high enough level to ensure that the component rights are affordable to individuals in receipt of welfare. Despite the fact that one reason of ‘providing benefits is the prevention of poverty,’<sup>1074</sup> out of work benefits are ‘typically well below the relative poverty line.’<sup>1075</sup> Thus, social security payments in the UK, especially out of work benefits, rarely protect individuals in receipt of them from poverty and hardship causing a lack of financial resources which prevents ‘individuals from being able

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<sup>1070</sup> See chapter 5.6.

<sup>1071</sup> JRF, ‘Briefing for November 2017 Budget: Incomes Not Keeping up with Prices’ (Joseph Rowntree Foundation 2017) 2 <<https://www.jrf.org.uk/file/50627/download?token=NeLxLf0n&filetype=briefing>> accessed 6 February 2020.

<sup>1072</sup> Royston (n 1053) 103.

<sup>1073</sup> *ibid* 111.

<sup>1074</sup> Paul Spicker, *How Social Security Works* (Policy Press 2016) 6.

<sup>1075</sup> Royston (n 1053) 28.

to participate fully in mainstream society.’<sup>1076</sup>

As well as this, welfare conditionality has taken a ‘punitive turn.’<sup>1077</sup> This has, in the UK, resulted in an increased use of sanctions<sup>1078</sup> – that is a full or partial suspension of benefit payments – which has been described as having the most dramatic impact under austerity.<sup>1079</sup> Despite the fact that out-of-work benefits are well below this minimum income standard, the increased use of sanctions has further cut the amount of income individuals receive from benefits and thus increased the challenge of unaffordability.<sup>1080</sup> Even hardship payments which are available during periods of sanction are ‘typically paid at 60% of the rate of their’ benefit entitlement.<sup>1081</sup> This further exacerbates already stretched incomes.

More so, under Universal Credit, these hardship payments are paid as a loan which is repaid via deductions from future universal credit payments.<sup>1082</sup> If Universal Credit rates are already insufficient to meet the minimum income standard, and if the level of these payments is reduced to repay a hardship loan, it follows that the adequacy of benefit payments is undermined rendering these payments furtherly insufficient. Consequently, sanctions often effectively leave individuals ‘without disposable income’<sup>1083</sup> and studies have highlighted that this may lead people to ‘borrow from unscrupulous lenders, enhancing vulnerability and stress’<sup>1084</sup> whilst also cutting down on food or resorting to less than ideal approaches to

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<sup>1076</sup> Ruth Patrick, *For Whose Benefit? The Everyday Realities of Welfare Reform* (Policy Press 2017) 203.

<sup>1077</sup> For an overview of this punitive turn which is indicated by increased use of sanctions see Grover, ‘Violent Proletarianisation: Social Murder, the Reserve Army of Labour and Social Security “Austerity” in Britain’ (n 939) 4–5.

<sup>1078</sup> Edmiston (n 936) 263.

<sup>1079</sup> Oette (n 326) 676.

<sup>1080</sup> Royston (n 1053) 230.

<sup>1081</sup> *ibid* 225.

<sup>1082</sup> *ibid*.

<sup>1083</sup> Oette (n 326) 689.

<sup>1084</sup> *ibid* 690.

acquiring food.<sup>1085</sup> Not only are some of those on low incomes unable to afford sufficient food, but additionally, De Schutter highlights that, due to the fact that other expenses such as rent are incompressible, food expenditure may be the first area in which those on low incomes seek to make savings.<sup>1086</sup> This notion of prioritising expenditure out-goings has been typified in the ‘heat or eat’ dilemma: that is having to choose between spending money on eating food or heating the home.<sup>1087</sup>

A lack of income from which to afford adequate food supports the view that ‘income poverty is the main reason for food poverty.’<sup>1088</sup> However, chronic low income alone has been found not to be the primary reason for seeking assistance from foodbanks.<sup>1089</sup> Rather this low income makes individuals vulnerable to fluctuations in income and income crises<sup>1090</sup> and this links strongly to the destitution theme of vulnerability. The leading causes of referrals to the Trussell Trust in 2015 were ‘benefit delays (30.93 %); low income (20.29 %); benefit changes (16.97 %); debt (7.85 %); and refusal of a crisis loan (4.29%)’<sup>1091</sup> and this aligns with the view that income shocks are a greater cause of foodbank use than low income alone. Benefit delays are especially worrying as an applicant to universal credit often has nowhere else to turn and

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<sup>1085</sup> Including searching bins and skips for food see *ibid*; see also BBC News, ‘Hungry Children “eating from School Bins” in Morecambe’ 10th January 2019’ <<https://www.bbc.co.uk/news/uk-england-lancashire-46827360>> accessed 29 August 2019; see also –A couple who were informed that they would not receive any benefits for a year were arrested and charged with theft after taking discarded food from Tesco bins Anonymous, ‘Judge Takes Pity on Tesco Food Bin Thieves’ *The Telegraph* (12 May 2015) <<https://www.telegraph.co.uk/news/uknews/law-and-order/11600376/Judge-takes-pity-on-Tesco-food-bin-thieves.html>> accessed 29 August 2019.

<sup>1086</sup> Olivier De Schutter, ‘Foreword’ in Graham Riches and Tiina Silvasti (eds), *First World Hunger revisited: Food charity or the Right to Food?* (Palgrave Macmillan 2014) ix–xi, x.

<sup>1087</sup> Garthwaite (n 1057) 121.

<sup>1088</sup> Silvasti and Riches (n 1039) 206.

<sup>1089</sup> Rachel Loopstra and Doireann Lalor, ‘Financial Insecurity, Food Insecurity, and Disability: The Profile of People Receiving Emergency Food Assistance from The Trussell Trust Foodbank Network in Britain’ (The Trussell Trust 2017) 2 <[https://trusselltrust.org/wp-content/uploads/sites/2/2017/06/OU\\_Report\\_final\\_01\\_08\\_online.pdf](https://trusselltrust.org/wp-content/uploads/sites/2/2017/06/OU_Report_final_01_08_online.pdf)> accessed 18 June 2019.

<sup>1090</sup> *ibid*.

<sup>1091</sup> Just Fair (n 509) 95.

as such, if universal credit fails them or they have to wait to receive their first payment, they have no choice but to turn to food aid.<sup>1092</sup> This further supports my analysis that austerity influenced social security policies in the UK since 2010 are destitution inducing. This is because it is the design of the structures through which people access benefits which is causing individuals to use charitable assistance and thus experience destitution. Whether the primary cause is low income or in fact income shock the issue of (un)affordability is at the forefront and this has implications for the affordability of food. For example, Taylor and Loopstra's 2012 research project found that 28% of adults reduced their own food consumption to ensure others in their household could eat whilst at the same time '4% of children lived in families who could not afford to feed them properly.'<sup>1093</sup>

As well as this, (un)affordability has been highlighted as a particular pertinent issue in regard to accessing adequate housing.<sup>1094</sup> These observations have been made specifically in relation to those in receipt of housing benefit given that 'for many tenants there was a large gap between the amount they received in housing benefit and the rent required on any property, whatever the quality.'<sup>1095</sup> This further evidences my above contention that's social security rates are not high enough to ensure that individuals can afford to access their component rights. Hohmann cites 67% of local authorities in England having reported 'that welfare cuts since 2010 had increased homelessness in their area.'<sup>1096</sup> This highlights the pertinence of social security to ensuring that the poorest in our society are able to access adequate housing. More so, previous links have been drawn between reductions in housing benefit within the UK and

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<sup>1092</sup> HRW (n 1047) 85.

<sup>1093</sup> Anna Taylor and Rachel Loopstra, 'Too Poor to Eat: Food Insecurity in the UK' (The Food Foundation 2016) 7 <<https://foodfoundation.org.uk/wp-content/uploads/2016/07/FoodInsecurityBriefing-May-2016-FINAL.pdf>> accessed 18 June 2019.

<sup>1094</sup> Clark et al. (n 1041) 36.

<sup>1095</sup> *ibid.*

<sup>1096</sup> Hohmann (n 530) 13.

vulnerability to eviction and homelessness.<sup>1097</sup> Combined with these ‘deep cuts to social welfare benefits’<sup>1098</sup> a lack of availability (or supply of housing), unaffordability caused by high and increasing costs, a ‘lack of security of tenure, and homes of such poor quality that they are unfit for habitation’<sup>1099</sup> have come together to contribute to a housing crisis in which ‘exceptionally high numbers of people are homeless, or vulnerable to homelessness.’<sup>1100</sup>

Described as a fundamental failing<sup>1101</sup> in welfare support, cuts to the Local Housing Allowance (LHA) have seen LHA fall to rates which are ‘insufficient to enable low-income households to find alternative accommodation if they lost their home, causing homelessness.’<sup>1102</sup> Being impoverished therefore leaves individuals at risk of eviction and, due to the difficulties faced in finding new accommodation, in turn homelessness.<sup>1103</sup>

As well as the examples of food and housing given in the preceding paragraphs, (un)affordability has implications for clothing. For example, Members of the Scottish Parliament have, in recent years, raised concerns that school uniform costs are too high with rising costs leaving ‘far too many families struggling to cope’<sup>1104</sup> and ‘pupils from low-income families are being penalised or excluded’<sup>1105</sup> as failure to purchase the appropriate or correct uniform can see children excluded from lessons. For example, a student whose trousers did not

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<sup>1097</sup> O’Connell, ‘Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity’ (n 976) 64.

<sup>1098</sup> Hohmann (n 530) 3.

<sup>1099</sup> *ibid.*

<sup>1100</sup> *ibid.*

<sup>1101</sup> Clark et al. (n 1041) 4.

<sup>1102</sup> *ibid.*

<sup>1103</sup> *ibid.*

<sup>1104</sup> BBC News, ‘Schools Told “Cut Excessive Uniform Costs”’ (12 July 2018) <<https://www.bbc.co.uk/news/uk-scotland-44804197>> accessed 6 September 2019.

<sup>1105</sup> *ibid.*

touch the top of her shoes was excluded from class and ‘placed in another room’<sup>1106</sup> and 6% of children whose parents responded to one study had been sent home from school for wearing incorrect uniform.<sup>1107</sup> Royston and Jacques estimate that this amounts to almost half a million children having been sent home ‘because of wearing incorrect uniform.’<sup>1108</sup>

As well as impacting the child’s education, which has rights implications in itself, the cost of uniforms has resulted in parents being forced to choose between feeding their children and buying them the clothing required.’<sup>1109</sup> People are going hungry in order to afford the cost of purchasing school uniforms.<sup>1110</sup> A 2018 study found that 17% of parents cut back spending on ‘food or other basic essentials’ in order to meet school uniform costs.<sup>1111</sup> 3% took on debt and 10% borrowed money from someone else.<sup>1112</sup> Royston and Jacques estimate that in 2018 *330,000 more* families had to cut back on food and other basic essentials due to uniform costs than in 2015.<sup>1113</sup> Thus, the problem is only worsening. The DfE itself notes that 18% ‘of parents/carers reported that they had suffered financial hardship as a result of purchasing their child’s school uniform.’<sup>1114</sup>

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<sup>1106</sup> BBC News, ‘Pupil with “too Short” Trousers Taken out of Class in Nottinghamshire’ (5 September 2019) <<https://www.bbc.co.uk/news/uk-england-nottinghamshire-49592200>> accessed 16 September 2019.

<sup>1107</sup> Sam Royston and Rebecca Jacques, ‘The Wrong Blazer 2018: Time for Action on School Uniform Costs’ (The Children’s Society 2018) 6 <[https://www.childrenssociety.org.uk/sites/default/files/the-wrong-blazer-report-full-compressed\\_0.pdf](https://www.childrenssociety.org.uk/sites/default/files/the-wrong-blazer-report-full-compressed_0.pdf)> accessed 6 September 2020.

<sup>1108</sup> *ibid* 7.

<sup>1109</sup> BBC News, ‘Schools Told “Cut Excessive Uniform Costs”’ (n 1104).

<sup>1110</sup> Royston and Jacques (n 1107) 6; BBC News, ‘Schools Told “Cut Excessive Uniform Costs”’ (n 1104); BBC News, ‘New Guidance Promised on Branded School Uniforms’ (5 September 2019) <<https://www.bbc.co.uk/news/uk-england-49591950>> accessed 6 September 2019.

<sup>1111</sup> Royston and Jacques (n 1107) 6.

<sup>1112</sup> *ibid*.

<sup>1113</sup> *ibid* 7.

<sup>1114</sup> Elizabeth Davies, ‘Cost of School Uniform 2015’ (Department for Education 2015) 11 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/436576/RR474\\_Cost\\_of\\_school\\_uniform.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/436576/RR474_Cost_of_school_uniform.pdf)> accessed 6 September 2019.

Such financial hardship was, however, less likely if the school allowed all items of the uniform to be purchased anywhere.<sup>1115</sup> This is because such policies allow parents to ‘shop around’. Some schools receive a financial incentive by entering into single supplier contracts which allow only one retailer to provide items branded with their logos.<sup>1116</sup> As well as this, requirements that students have a particular type of uniform such as trousers with a certain piping or embroidered badges also increase the costs associated with uniforms. In one school students were excluded from lessons as their ‘trousers did not have purple piping.’<sup>1117</sup> In this example, one parent was quoted as stating they were ‘not paying [for] ridiculous, overpriced trousers that have got a bit of purple trim on the top.’<sup>1118</sup> Costing between £20-£22 the official trousers, distinguished by the purple lining, were twice as expensive as non-official trousers. More generally, a UK government inquiry heard that blazers, trousers, and socks can be three-times more expensive ‘when embroidered with school logos.’<sup>1119</sup>

A 2015 Department for Education research report found that the average total expenditure on school uniform between September 2014 and February 2015 was £212.88.<sup>1120</sup> However, this varied by both gender and school age. The average cost of uniform during this period for males was £192.14 in primary school and £231.01 in secondary school.<sup>1121</sup> Female uniform costs were, on average, more expensive at £201.04 and £239.93 for primary school and secondary school respectively.<sup>1122</sup> It is important to keep in mind that these figures may not accurately represent the true academic-yearly cost of school uniform in that the study captured

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<sup>1115</sup> *ibid.*

<sup>1116</sup> BBC News, ‘New Guidance Promised on Branded School Uniforms’ (n 1110).

<sup>1117</sup> BBC News, ‘Stoke-on-Trent School Puts “wrong Trousers” Pupils in Isolation’ (5 September 2018) <<https://www.bbc.co.uk/news/uk-england-stoke-staffordshire-45420905>> accessed 5 September 2019.

<sup>1118</sup> *ibid.*

<sup>1119</sup> BBC News, ‘New Guidance Promised on Branded School Uniforms’ (n 1110).

<sup>1120</sup> Davies (n 1114) 9.

<sup>1121</sup> *ibid.*

<sup>1122</sup> *ibid.*

the expenditure between September and February as opposed to the full British academic year which is September to July. More so, it is worth noting that the majority of this expenditure would likely be concentrated in a short window between mid-July and September – the back-to-school sales period – as this is when larger retailers stock a wider selection of back-to-school supplies. Thus, in that this expense will be concentrated in a particularly small window it may constitute an income shock especially for those on already inadequate incomes who are unable to set money aside – on account of having little to no disposable income after the cost of necessities - throughout the year.

### **6.3.3. Accessibility**

As I have shown above<sup>1123</sup> social security ought to act as a safeguard to prevent (un)affordability acting as a barrier to the attainment and realisation of the component rights. However, social security itself raises issues of accessibility. Accessibility in terms of social security may be considered alongside the concept of welfare conditionality. This is because conditionality may act as a barrier to access by presenting obstacles such as ‘registering and applying for jobs.’<sup>1124</sup> Barriers of accessibility include a requirement to ‘job hunt’ using specific online portals which in turn require internet access and a device capable of accessing the internet. As well as this, Armstrong highlights that, as Universal Credit applications can only be made online this new social security policy is inaccessible to the poorest 20%.<sup>1125</sup>

Additionally, the preceding section has demonstrated the potential that (un)affordability has to act as a barrier to accessing the component rights. However, economic

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<sup>1123</sup> See chapter 4.3.7.

<sup>1124</sup> Yvonne Hartman and Sandy Darab, ‘The Hidden Costs of Injured Dignity: An Exploration of One Effect of Workfare Policies’ in Robert Garbutt (ed), *Activating Human Rights and Peace: Universal Responsibility Conference 2008 Conference Proceedings* (Centre for Peace and Social Justice 2010) 260–269, 265.

<sup>1125</sup> Armstrong (n 156) 142–143.



(un)accessibility – that is (un)affordability – does not necessarily act as a barrier to individuals accessing the substance of the rights. This is because individuals have resorted to a number of mechanisms in response to the seemingly impossible balancing of multiple expenses which their limited incomes simply cannot afford.

One such mechanism has been charitable assistance. Prominent examples of this include school uniform banks and food banks. In relation to school uniforms, uniform banks, which have been described as being similar to foodbanks,<sup>1126</sup> have emerged. One such uniform bank has been described as being overwhelmed by demand.<sup>1127</sup> The Edinburgh school uniform bank ‘was set up in response to reports that school children were asking Santa for basic school uniform items and underwear for Christmas.’<sup>1128</sup> Through collecting donations of money and clothes this organisation puts ‘together ‘Back to School’ packs for children from families in need.’<sup>1129</sup> This organisation has seen applications for help rise from 233 to 472: an increase of 102.58% between 2017 and 2018.<sup>1130</sup> School uniform banks can operate under a referral system, for example the Cumbernauld and Kilsyth Care School Uniform Bank provides a mixture of new and second-hand items free of charge to families in need.<sup>1131</sup> Those making referrals for the Edinburgh Uniform Bank include head teachers and social workers for such reasons as domestic violence, low income, and benefit delays.<sup>1132</sup> As well as this, some parents have taken to swapping uniform with other parents – including through the use of social media

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<sup>1126</sup> BBC News, ‘Cannock Free School “uniform Bank” Overwhelmed by Demand’ (8 August 2018) <<https://www.bbc.co.uk/news/uk-england-stoke-staffordshire-45116723>> accessed 6 September 2020.

<sup>1127</sup> *ibid.*

<sup>1128</sup> Joanne Macaulay, ‘School Uniform Costs: Children “Asking Santa for Basic Items”’ (*BBC News*, 1 August 2019) <<https://www.bbc.co.uk/news/uk-scotland-49072123>> accessed 6 September 2019.

<sup>1129</sup> *ibid.*

<sup>1130</sup> Angie Brown, ‘Sharp Rise in School Uniform Grants in Edinburgh’ (*BBC News*) <<https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-48511816>> accessed 6 September 2019.

<sup>1131</sup> Anonymous, ‘School Uniform Grants Still Unequal’ (*BBC News*, 11 August 2017) <<https://www.bbc.co.uk/news/uk-scotland-40889900>> accessed 6 September 2019.

<sup>1132</sup> Brown, ‘06/06/2019’ (n 1130).

groups<sup>1133</sup> and ‘research by the BBC found over 34,000 members of 100 groups on Facebook that have been set up to swap uniforms online.’<sup>1134</sup> This demonstrates how (un)affordability will not always act as a barrier to accessibility

The same is true in regard to food. Increasingly individuals ‘are coming to depend on food aid’<sup>1135</sup> and Livingstone highlights that charities have come to provide the means to address food poverty.<sup>1136</sup> Food aid may take a number of forms. In the context of the UK charities have been identified as the primary providers of food aid with foodbanks being especially highlighted as ‘prolific providers of emergency food aid across the UK.’<sup>1137</sup>

However, the concept of accessibility is undermined when access to food is only acquired through food aid. This is because the structures and procedures of food aid providers may also limit accessibility.<sup>1138</sup> For example, the Trussell Trust, which is the largest food aid provider in the UK, operates a referral system.<sup>1139</sup> Food aid recipients must be referred by a gatekeeper who provides a voucher to be exchanged for food aid.<sup>1140</sup> These gatekeepers are usually front line professionals and are referred to as ‘voucher holders.’<sup>1141</sup> Given that such professionals are often state welfare professionals this is indicative that food aid provision is increasingly embedded within the UK’s welfare system with these vouchers being regarded as

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<sup>1133</sup> Rebecca Wearn and Rob England, ‘School Uniform: Can It Be Bought More Cheaply?’ (*BBC News*, 13 August 2019) <<https://www.bbc.co.uk/news/uk-england-49090913>> accessed 6 September 2019.

<sup>1134</sup> Anonymous, ‘Back-to-School Uniform Swap-Shop Is Dorset Mum’s Mission’ (*BBC News*, 21 August 2019) <<https://www.bbc.co.uk/news/av/uk-england-dorset-49397392/back-to-school-uniform-swap-shop-is-dorset-mum-s-mission>> accessed 6 September 2019.

<sup>1135</sup> Riches and Silvasti (n 1045) 4.

<sup>1136</sup> Nicola Livingstone, ‘The Hunger Games: Food Poverty and Politics in the UK’ (2015) 39 *Capital & Class* 188, 189.

<sup>1137</sup> *ibid.*

<sup>1138</sup> Silvasti and Riches (n 1039) 203; Lambie-Mumford (n 1037) 92.

<sup>1139</sup> Livingstone (n 1136) 190; Garthwaite (n 1057) 37.

<sup>1140</sup> Lambie-Mumford (n 1037) 89–90.

<sup>1141</sup> Garthwaite (n 1057) 43.

‘an important addition to the toolkit of professionals within, in some cases, state-funded services.’<sup>1142</sup>

More pertinently for this analysis, the use of such a voucher system may act to prevent access to food aid. This is because the gatekeeper may not, in their judgment, choose to refer an individual. This argument may be extrapolated to apply to the realisation of any of the component rights which relies on charitable assistance including, *inter alia*, uniforms banks which also operate referral systems. As well as this, specifically in relation to food aid, the Trussell Trust operates a three-voucher policy aimed at preventing dependency.<sup>1143</sup> This is indicative of the time-limited nature of the support provided by foodbanks.<sup>1144</sup> Although in some circumstances this policy is waived, this policy prevents individuals receiving food aid from the Trussell Trust more than three times in any six-month period.<sup>1145</sup> This limits the amount of assistance an individual may receive in regard to food aid and is indicative of the vulnerability faced by those utilising foodbanks in order to access food.

A final criticism of charitable assistance from an accessibility perspective can be made from a discrimination perspective. This is because charitable assistance providers do not have the same obligations of non-discrimination as the State. Take, as an example, the practice of ‘souperism’ by which only those who were willing to convert from Catholicism to Protestantism were provided with food by protestant soup kitchens in the 19<sup>th</sup> Century.<sup>1146</sup> Thus, the potential exists for individuals to be denied access to such services based on discrimination.

Not only do issues of accessibility manifest themselves in regard to referrals but the

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<sup>1142</sup> Lambie-Mumford (n 1043) 16.

<sup>1143</sup> Livingstone (n 1136) 190; HRW (n 1047) 26.

<sup>1144</sup> HRW (n 1047) 26.

<sup>1145</sup> Lambie-Mumford (n 1037) 90; Livingstone (n 1136) 190.

<sup>1146</sup> Tom Shiel, ‘Mass Remembers “Soup for Converttees” during Famine’ *Independent.ie* (2011) <<https://www.independent.ie/irish-news/mass-remembers-soup-for-converttees-during-famine-26772848.html>> accessed 18 February 2020.

nature of such aid providers means that they may be geographically or temporally inaccessible. This refers to the notion of ‘food deserts’ which are areas ‘poorly served by food store’.<sup>1147</sup> This notion can be extended beyond food stores to also include food aid providers. For example, an individual may not have their own car and, if their income is so low that they have been referred, may not be able to afford public transport in order to travel to the aid provider. This means that although they have the potential to access the aid, they are unable to do so due to other factors such as being geographically separated from the aid provider’s base. The opening times of the aid provider may also act as a barrier to accessibility. This is because if an individual is in need of such charitable assistance despite being employed the charitable assistance provider may not be open – and as such accessible - outside of that individual’s working hours. These geographical and temporal examples demonstrate that aid providers may not always be accessible.

However, even when aid providers are accessible that is no guarantee that the aid itself is accessible. This is because if the resource in which the aid provider deals becomes unavailable to aid providers, it follows that aid recipients will no longer be able to access via aid providers. Thus, insecurity of availability for the aid provider, as outlined above,<sup>1148</sup> also creates insecurity of accessibility for the aid recipient.

As well as this charitable assistance providers may have their activities disrupted which in turn prevents those reliant upon such aid from accessing the content of the right in question. For example, The Bread and Butter Things surplus food supermarket, a charity which ‘works on a system where members pay £7 for a bag of fresh food that would have otherwise gone to

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<sup>1147</sup> Scott Corfe, ‘What Are the Barriers to Healthy Eating in the UK’ (Social Market Foundation 2018) 5 <<http://www.smf.co.uk/wp-content/uploads/2018/10/What-are-the-barriers-to-eating-healthy-in-the-UK.pdf>> accessed 18 June 2019.

<sup>1148</sup> See section 6.3.3.

landfill,’<sup>1149</sup> had two of their four vans stolen. This resulted in the cancellation of planned sessions which in turn prevented 250 families from being served on one day alone.<sup>1150</sup> Thus families who had planned to access food using this mechanism were unable to do so and, more so, were left in a situation in which they were unable to ‘get that amount of food for the same amount of money at a supermarket.’<sup>1151</sup> On account of these factors, the receipt of food aid – and I argue other charitable assistance - is not guaranteed and ‘is unprotected for those who do gain access’<sup>1152</sup> who in turn are vulnerable to losing access. This links, strongly, to the analysis of the big society as destitution inducing in chapter 5.6 and the discussion of charitable provision, in chapter 2.2, upon which this built.

#### **6.3.4. Acceptability**

What is clear from the above analysis is that even when (un)affordability acts as a barrier to purchasing essentials these essentials can be accessed in other ways. Namely through charitable assistance. However, as I have demonstrated above reliance on such provision raises a number of issues especially in relation to vulnerability to loss of access. Not only this, but charitable assistance raises a number of issues in relation to acceptability. Firstly, the extent to which the aid provided is acceptable and, secondly, the extent to which the use of charitable assistance is acceptable.

In relation to whether the aid provided is acceptable it can be argued that reliance on charitable assistance makes individuals vulnerable to having their needs and preferences overlooked. Specifically, in relation to the right to food, individuals in receipt of food aid ‘have

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<sup>1149</sup> Adam Maidment, ‘Thieves Steal Two Vans from Surplus Supermarket Service before Dumping Them in Street’ (*Manchester Evening News*, 26 September 2019) <<https://www.manchestereveningnews.co.uk/news/greater-manchester-news/thieves-steal-two-vans-surplus-16971389>> accessed 26 September 2019.

<sup>1150</sup> *ibid.*

<sup>1151</sup> *ibid.*

<sup>1152</sup> Lambie-Mumford (n 1037) 93.

to accept charity food in spite of their actual needs and preferences.<sup>1153</sup> This may raise issues of quality which will be explored in the following section.<sup>1154</sup> This reasoning can be extended beyond this food-based example to contend that those who rely on charitable assistance to meet their essential needs have little choice but to accept that which is offered to them. This disregards that which is acceptable to the individual. This also necessarily results in individuals losing ‘part of their freedom of choice and inherent human dignity’<sup>1155</sup> and I question the extent to which, on account of this, charitable assistance is acceptable.

More strongly however, the work of Lambie-Mumford, who dedicates an entire chapter of her 2017 book on the rise of food charity in the UK<sup>1156</sup> to exploring ‘the question of whether receiving food from emergency food providers is an acceptable process of obtaining food, by right to food standards,’<sup>1157</sup> can be used to argue that charitable assistance provision is not an acceptable means of realising the component rights. In relation to acceptability Lambie-Mumford highlights ‘otherness’ as being ‘highly problematic when exploring notions of ‘acceptability’ in a right to food context.’<sup>1158</sup> This otherness rests on the fact that unlike those who acquire food through the marketplace, those in receipt of food aid are no longer purchasers and selectors of food. Instead, they are recipients ‘stripped of their agency and choice (a key value in the contemporary food system in the UK).’<sup>1159</sup> Utilising the theme of social (un)acceptability, Lambie-Mumford’s chapter’s findings suggest that under right to food standards ‘emergency food provision is not an acceptable means of food acquisition.’<sup>1160</sup>

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<sup>1153</sup> Riches and Silvasti (n 1045) 9.

<sup>1154</sup> See section 6.3.5.

<sup>1155</sup> Riches and Silvasti (n 1045) 9.

<sup>1156</sup> Lambie-Mumford (n 1037) ch 4.

<sup>1157</sup> *ibid* 57.

<sup>1158</sup> *ibid* 58.

<sup>1159</sup> *ibid* 73.

<sup>1160</sup> *ibid* 58.

This links to the destitution theme of indignity and can be expounded upon with reference to stigma. Middleton et al. analysed a range of food bank studies finding that food bank users had their pride challenged by the experience and that using foodbanks ‘made them feel inadequate as providers for their families, causing feelings of embarrassment and shame.’<sup>1161</sup> This shame and felt - or internal – stigma ‘appears to be a very real barrier to people accessing food banks, and can also be expected to exert a negative impact on psycho-social health over and above the impact on physical health caused by poor nutrition.’<sup>1162</sup> Stigma, and other negative feelings, also have implications for dignity with a number of food bank users feeling that foodbank use negatively impacted their dignity.<sup>1163</sup> This serves to evidence, further, that a reliance on charitable assistance – by engaging the destitution theme of indignity – is central to the destitution experience in the United Kingdom.

On top of all of this, a reliance upon charitable assistance to meet people’s essential needs is a deflection, by the state, of its responsibilities in regard to the realisation of the right to food<sup>1164</sup> with there being concern that foodbanks ‘are, in practice, becoming a substitute for an adequate social security system.’<sup>1165</sup> According to Alston, such charitable food aid provision ‘is not an adequate substitute for a Government fulfilling its obligations. Food banks cannot do the Government’s job.’<sup>1166</sup> This can be considered alongside De Schutter’s contention that ‘nowhere should governments be allowed to escape their obligations because private charities

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<sup>1161</sup> Georgia Middleton et al., ‘The Experiences and Perceptions of Food Banks amongst Users in High-Income Countries: An International Scoping Review’ (2018) 120 *Appetite* 698, 701.

<sup>1162</sup> *ibid* 706.

<sup>1163</sup> *ibid* 702.

<sup>1164</sup> Sue Booth, ‘Food Banks in Australia: Discouraging the Right to Food’ in Graham Riches and Tiina Silvasti (eds), *First World Hunger revisited: Food charity or the Right to Food?* (Palgrave Macmillan 2014) 15–28, 15–16.

<sup>1165</sup> Just Fair (n 509) 97.

<sup>1166</sup> Alston, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the United Kingdom of Great Britain and Northern Ireland’ (n 5) para 1.

make up for their failures. When people come to depend on charity for basic foodstuffs, it is a signal that their right to food has not been sufficiently respected, protected and fulfilled.’<sup>1167</sup> Booth contends that more structural solutions must be sought to address food poverty and that currently this has not occurred as charitable food responses have dominated the response to food poverty.<sup>1168</sup> This is because charity, in this regard, merely perpetuates the failings of the state. For example, concerns have been raised that, by transferring the responsibility of food insecurity to charitable assistance, ‘food banks may actually contribute to the problem of food insecurity, rather than solve it.’<sup>1169</sup>

As such, the arguments throughout this section on acceptability can be used to contend that if an individual is only able to realise one or more of their component rights using charitable assistance then they are destitute under my definition. This can be supported using the example of food aid in that a number of authors have linked the use of foodbanks to destitution with Loopstra and Lalor suggesting that people using foodbanks ‘experience severe food insecurity and forms of destitution.’<sup>1170</sup> More specifically, Garthwaite has contended that ‘the increased use of foodbanks in particular, is indicative of destitution.’<sup>1171</sup>

### **6.3.5. *Quality***

Reliance on charitable assistance also has implications for the quality of rights realisation in that the quality of charitable assistance is below that of accessing resources through the market. Pertaining to accessing food via charitable assistance a range of issues are raised in regard to quality. Foodbank users have negative perceptions of both the quality and quantity of the food

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<sup>1167</sup> De Schutter (n 1086) x.

<sup>1168</sup> Booth (n 1164) 16.

<sup>1169</sup> Middleton et al. (n 1161) 699.

<sup>1170</sup> Loopstra and Lalor (n 1089) 46.

<sup>1171</sup> Garthwaite (n 1057) 7.



they receive.<sup>1172</sup> Tying together the discussion of the acceptability of food<sup>1173</sup> as well as to the discussions regarding the availability of food above,<sup>1174</sup> limited food choice at foodbanks results in food bank users having ‘to take food that they would not regularly eat, did not know how to prepare or was inappropriate in terms of cultural or health needs.’<sup>1175</sup> This limited choice also results in food that is ‘unhealthy,’ ‘expired,’ ‘mouldy,’ ‘rotten,’ ‘disgusting,’ – in sum of ‘sub-optimal’<sup>1176</sup> quality - being received.<sup>1177</sup> This provision of unsuitable food, which Middleton et al highlighted as a reoccurring theme across a range of foodbank studies, has been described as a ‘consistent violation of dignity.’<sup>1178</sup> Thus, a reliance on charitable assistance to attain the physical substance of the component rights has been demonstrated, once again, to have implications for the destitution theme of indignity.

Beyond charitable assistance, unaffordability has its own implications for quality. This is because individuals may not be able to access the substance of the component rights of the quality required by their additional needs due to issues of unaffordability. An example of this is in relation to the quality of housing. Some categories of individuals in receipt of housing benefit are limited as to the amount of housing benefit they may claim. For example, those aged ‘under 35 with no dependants are only able to claim for the cost of a room in a shared house, regardless of whether such accommodation is available or appropriate, for example for vulnerable individuals.’<sup>1179</sup> Thus, options of the quality required especially by those with additional needs are made unaffordable by social security policy. This is because, in this

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<sup>1172</sup> Middleton et al. (n 1161) 702.

<sup>1173</sup> See section 6.3.4.

<sup>1174</sup> See section 6.3.1.

<sup>1175</sup> Middleton et al. (n 1161) 702.

<sup>1176</sup> *ibid* 706.

<sup>1177</sup> *ibid* 702.

<sup>1178</sup> *ibid* 707.

<sup>1179</sup> Hohmann (n 530) 14.

example, such individuals must either choose to live in housing which is not of sufficient quality to meet their additional needs or, instead, themselves make up the difference between the cost of such inappropriate housing and other more appropriate (and likely more expensive) accommodation. Affordability may act as a barrier to this second option thus consigning such individuals to housing which is not of a quality to meet their needs.

Another example relates to the unaffordability of school uniforms. A 2018 study found that 11% of children had no choice but to wear ill-fitting uniform whilst 7% wore unclean uniform<sup>1180</sup> and ‘according to the charity In Kind Direct, one in five parents say they cannot afford to wash their children's clothes as often as they would like.’<sup>1181</sup> Such sentiments made national headlines in 2017 when Siobhan Collingwood, the headmistress of a Morecambe primary school, stated that the school’s laundry room was being used ‘pretty much daily’ by families who ‘haven’t got a washing machine at home’ or who didn’t have ‘enough money to pay for the meter.’<sup>1182</sup> Not only does ill-fitting and unclean clothing have the potential to negatively impact physical health<sup>1183</sup> but also the head of One Parent Families Scotland has stated that ‘The cost of school uniforms is leaving many children in low income families at risk of bullying and embarrassment because they are sent to school in ill-fitting clothes or in clothes which don't meet the dress code.’<sup>1184</sup> This demonstrates that ill-fitting and unclean uniforms create stigma. At the same time this serves to demonstrate that issues of affordability and issues

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<sup>1180</sup> Royston and Jacques (n 1107) 6.

<sup>1181</sup> Tom Hepworth, ‘Mobile Laundry Helps School Wash Children’s Uniforms’ (*BBC News*, 8 February 2019) <<https://www.bbc.co.uk/news/av/uk-england-dorset-47144398/mobile-laundry-helps-school-wash-children-s-uniforms>> accessed 6 September 2019.

<sup>1182</sup> James Tozer, ‘Schools Are Washing Poor Pupils Clothes and Taking Parents to Food Banks, Claims Headteacher Accused of Anti-Tory Crusade’ (*Mail Online*, 14 December 2017) <<https://www.dailymail.co.uk/news/article-5177581/School-washing-pupils-clothes-says-primary-headteacher.html>> accessed 6 September 2020.

<sup>1183</sup> See chapter 4.3.2.

<sup>1184</sup> Anonymous, ‘Charities Call for Action on School Clothing Grants’ (*BBC News*, 8 August 2016) <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-37002533>> accessed 6 September 2019.

emanating from a reliance on charitable assistance are undermining the quality of uniforms. In applying this example to the component rights homogenously, I contend that this demonstrates that the quality of the component right realisation has the very real potential to be below acceptable standards due to issues of affordability.

#### **6.4. The Destitution Threshold of Each Component Right in the UK**

##### ***6.4.1. The Right to Housing***

At a minimum, the minimum core obligation of basic shelter should act as a baseline in determining whether an individual is destitute on account of the level of realisation of their right to housing. If an individual does not have basic shelter, then they are destitute. However, it is clear that the right to housing, and its related minimum core obligations, goes beyond basic shelter alone. The notion of adequacy is of pertinence in determining the destitution for the right to housing in the UK.

In the UK context, the Housing Act 1957 defines a standard of fitness and lists matters to be taken into account when determining whether a house may be unfit for human habitation. This can therefore be used as a guide to determine adequacy. These matters are repair; stability; freedom from damp; natural lighting; ventilation; water supply; drainage and sanitary conveniences; and facilities for storage, preparation and cooking of food and for the disposal of waste water.<sup>1185</sup> The Landlord and Tenant Act 1985 adds internal arrangement to this list<sup>1186</sup> and the Homes (Fitness for Human Habitation) Act 2018 amended the 1985 Act.<sup>1187</sup> A house ‘shall be deemed to be unfit for human habitation if and only if it is so far defective in one or more of the said matters that it is not reasonably suitable for occupation in that condition.’<sup>1188</sup>

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<sup>1185</sup> Housing Act 1957 s 4 (1).

<sup>1186</sup> Landlord and Tenant Act 1985 s 10 (1).

<sup>1187</sup> Homes (Fitness for Human Habitation) Act 2018 s 1 (1).

<sup>1188</sup> Housing Act s 4 (1).

As is clear from this, the assessment of the adequacy of housing in the UK context and as such the UK's destitution threshold for the component right to housing, includes an assessment of water supply, drainage and sanitary conveniences, and facilities for storage, preparation and cooking of food and for the disposal of wastewater. This assessment therefore engages a consideration of the right to water and the right to sanitation. Given that an individual is destitute under my definition if one or more of the component rights are not realised to the destitution threshold it follows that an individual whose realisation of the component right to housing does not meet the destitution threshold is destitute. I argue that in the UK a house would fail to meet the destitution threshold of the right to housing if it does not provide appropriate realisation of the rights to water and sanitation. Consequently, the analysis of the realisation of the rights to water and sanitation must take place within the context of the analysis of the realisation of the right to housing. It follows that the realisation of these three component rights, within the UK, is tied together. Consequently, an individual who does not have access to housing to the level required to surpass the destitution threshold— even if they access to water and sanitation – is destitute under my definition. More so, in order to surpass the destitution threshold for the right to water and the right to sanitation in the UK, at the very minimum, it is required that these rights are realised through the home.

As was explored in greater detail in chapter 4.3.3 the right to housing should be seen as a right to *adequate* housing which should be adequately private, adequately spacious, adequately secure, adequately lit and adequately ventilated, with 'adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.'<sup>1189</sup> In the UK context the JRF destitution definition considers – in relation to housing – heating and

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<sup>1189</sup> CESCR, 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (1991) E/1992/23' (n 509) para 7.

lighting to be essentials.<sup>1190</sup> More so, I contend that, given the interrelated nature of the component rights, adequate housing in the UK includes the means to store and prepare food. These factors go some way to aiding my analysis of what constitutes adequate housing in the UK. Such housing allows physical access to utilities. However, physical access to utilities alone is not enough. This is because economic accessibility may act as a barrier to individuals using gas or electricity. For example, Garthwaite highlights how some individuals using foodbanks are unable to prepare the food with which they are provided as they cannot afford the cost of the utilities required to prepare the food.<sup>1191</sup>

This example shows how the notion of reasonable cost goes beyond simply the cost of housing to also include ensuring that the cost of ensuring the house has access to basic facilities is also reasonable. This engages the concept of affordability which is plainly an issue in regard to housing in the UK and research has found ‘that the contraction of the welfare state, including housing benefits, means that over 600,000 low-income households in Britain are in difficulty meeting their housing costs.’<sup>1192</sup>

One such change to housing benefits has been the bedroom tax. ‘The controversial ‘bedroom tax’ or ‘spare room subsidy sees housing benefit cut for households considered to be ‘under occupying’ social housing.’<sup>1193</sup> Designed to free up larger (that is under-occupied) social housing this policy has raised a number of issues in terms of adequacy of housing. For example, some of those who have been affected by this policy are unable to find smaller housing in their local area in order to avoid the ‘tax.’<sup>1194</sup> Combined with the fact that individuals

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<sup>1190</sup> Fitzpatrick et al. (n 2) 2.

<sup>1191</sup> Garthwaite (n 1057) 49–51.

<sup>1192</sup> Donald Houston et al., ‘Gaps In The Housing Safety Net’ (Shelter 2014) 50 <[https://england.shelter.org.uk/\\_data/assets/pdf\\_file/0006/960315/Final\\_report.pdf](https://england.shelter.org.uk/_data/assets/pdf_file/0006/960315/Final_report.pdf)> accessed 7 February 2020.

<sup>1193</sup> Hohmann (n 530) 13.

<sup>1194</sup> *ibid.*

may be unwilling to move away from their local areas due to personal factors such as ‘such as links with schools, family, local community and employment’<sup>1195</sup> the tax has in effect failed to achieve its aims and instead has simply increased the amount of money individuals have to find from elsewhere in order to cover their rent.

This has implications for how much money people have left over to access the substance of the other component rights and also suggests that there is not enough housing of the appropriate size available. More so, the ‘tax’ applied does not exempt spare rooms for overnight carers for children and ‘in cases where parents are separated, even where parents have joint custody only one household is entitled to a room for the child.’<sup>1196</sup> These examples demonstrate how some who need a spare bedroom are penalised by this policy and, if such individuals were to move to smaller housing to avoid this tax, this policy therefore has the potential to result in individuals living in properties which are inadequate for their needs. This is but one more example of the extent to which a failure of social security policy to account for human rights negatively impacts the realisation of the destitution threshold.

#### ***6.4.2. The Right to Water***

On account of the analysis in chapter 4.3.5. it is contended that the minimum core obligation pertaining to the right to water correlates to the availability of 20-25 l/p/d. Therefore, if an individual does not have access to 20-25 litres of adequate water per day then they are destitute. Even so, the AAAAQ framework can serve as a useful guide to go beyond this and identify the destitution indicators. Thus availability, accessibility, acceptability, affordability derived from economic accessibility and quality assessments will contribute to the assessment of whether an individual is destitute due to the level of realisation of their right to water.

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<sup>1195</sup> *ibid.*

<sup>1196</sup> *ibid.*

The amount of water required must be sufficient to allow the destitution thresholds of the various component rights to be met. The most natural link here is the right to sanitation. However, as was made clear in chapter 4.3.5., water is also important for the realisation of the right to food as it is required in both preparation and cooking. Clothing, also, requires water to be kept clean whether that be through the use of a washing machine or washing by hand. Other factors such as cleaning the home, which has implications for the right to housing, and personal hygiene which forms a part of an adequate standard of living. In the UK, however, an individual should always (with the exception of temporary disruptions to supply) be able to access a quantity of water sufficient to meet these needs provided that they are able to access water through the home.

Water is available through the national supply systems and water provided through this system is of the appropriate quality. Thus, the concepts of accessibility, affordability, and acceptability of the means of access are central to determining the destitution threshold for the right to water in the UK. In the first instance, and based on the reasoning in the previous section, I contend that an individual is destitute in the UK if they cannot access water through the home. Thus, those who are homeless, or those whose homes do not provide access to water (except in the case of temporary disruption) have their component right to water realised to a level below that of the destitution threshold and as such are destitute.

This is not only a question of the acceptability of access, and the unacceptability of homelessness, but also a question of the act of accessing in itself. Accessibility through the home is protected in the UK in that water cannot be disconnected from ‘any dwelling which is occupied by a person as his only or principal home’... ‘for reasons of non-payment of charges/bills.’<sup>1197</sup> Thus, even though the water service industry in the UK is privatised, statutory

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<sup>1197</sup> Water Industries Act 1991 Schedule 4A as amended by of the Water Industry Act 1999 s.1 .

provisions ensure that affordability does not prevent access to water by making it illegal to disconnect the water supply to some types of property.<sup>1198</sup> Although this is a positive observation, this is also indicative of the strong links between the realisation of the right to water and the realisation of the right to housing in the context of the UK. Given, as I have addressed in section 6.4.1. above, that an individual without access to housing is destitute under my definition it follows that an individual who is able to access water but is unable to access water through housing is destitute under my definition.

However, despite the fact that (un)affordability is prevented from acting as a barrier to accessing water in the home this does not mean that the (un)affordability of water does not have wider implications. Ofwat, the economic regulator of the water sector in England and Wales, has been noted to have set targets to water companies including ‘helping 1.5m customers who are struggling to pay their bills.’<sup>1199</sup> I contend that the fact that individuals are struggling to pay for the essential that is water is indicative of wider issues of unaffordability. This is because this suggests that incomes are not high enough to pay for life’s essentials and this links to the discussion on affordability in section 6.3.2. Affordability.

### ***6.4.3. The Right to Sanitation***

Combined with the core content of the right to water, it is clear that the minimum core obligation of the right to sanitation relates to preventing, treating and controlling diseases. This is because a core obligation under General Comment 15 on the Right to water is ‘to take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.’<sup>1200</sup> Like the right to water, I contend that the destitution threshold for the

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<sup>1198</sup> Fitzmaurice (n 678) 556.

<sup>1199</sup> Gill Plimmer, ‘Ofwat Imposes Tough Requirements on Water Companies’ (*Financial Times*, 18 July 2019) <<https://www.ft.com/content/ff83aeec-a933-11e9-984c-fac8325aaa04>> accessed 26 September 2019.

<sup>1200</sup> CESCR, ‘General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002) UN.Doc. E/C.12/2002/11’ (n 504) para 37 (i).



right to sanitation in the UK, at the most basic level, requires that sanitation is accessible in the home.

This is because an individual who cannot access sanitation through housing faces a number of issues with regard to the normative content of the right. This was addressed in greater detail in chapter 4.3.6. In the UK an individual who relies on sanitation provided outside the home may face a number of barriers to use and access. For example, public toilets – if they are available - often have opening and closing hours. This engages the concepts of availability and accessibility. The concept of acceptability and quality also arise from this.

There should be, within the home, a toilet which is able to dispose of waste into the sewerage network or other appropriate facilities such as septic tanks which removes the risk of illness and disease caused by inadequate sanitation facilities. If an individual does not have access to housing but does have access to sanitation, they are destitute. Thus, in the UK in regard to the component right of sanitation, destitution goes beyond merely accessing the substantive content of the right to also include an analysis of the means of access.

#### ***6.4.4. The Right to Food***

Based on the analysis of the right to food in chapter 4.3.4., it is clear that the minimum core obligation of the right to food goes beyond merely consuming enough calories to survive. At the most basic level, I contend that the minimum core obligation of the right to food is a diet that prevents malnourishment.<sup>1201</sup> This can be supported through reference to the Special Rapporteur on the right to food who stated that the CESCR's General Comment on the Right to Health 'placed a core obligation on states to 'ensure access to the minimum essential food which is *nutritionally* adequate and safe.'<sup>1202</sup>

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<sup>1201</sup> See chapter 4.3.4. (n 646)

<sup>1202</sup> Italicised for my own emphasis Hilal Elver, 'Interim Report of the Special Rapporteur on the Right to Food' (United Nations 2016) UNDocA/71/282 para 58.

However, malnutrition includes obesity.<sup>1203</sup> Obesity can often evidence poor diet and it is clear that issues of affordability can contribute to this with it being cheaper to purchase the same number of calories in unhealthy food than it is to purchase those calories in healthy food.<sup>1204</sup> Obesity, as a form of malnutrition, clearly has implications for the right to food and the right to health. However, to state that all those who are obese are also destitute would be too broad a generalisation. Thus, with the exception of obesity related malnutrition and malnutrition linked to eating disorders, it is contended that an individual who is malnourished would be considered destitute under my definition.

Garthwaite highlights that ‘in 2015 dangerously poor diets led to the shocking return of rickets and gout – diseases of the Victorian age that affect bones and joints – according to the UK Faculty of Public Health.’<sup>1205</sup> More so, rare cases have been recorded of ‘people visiting their GP with ‘sicknesses caused by not eating.’<sup>1206</sup> This is indicative of malnutrition: a diet inadequate to maintain human health. This indicative nature can be supported using Just Fair’s observation that ‘a growth in the number of malnutrition-related hospital admissions’<sup>1207</sup> has prompted ‘experts to warn of a public health emergency.’<sup>1208</sup> The scale of such admissions is small being recorded at 7,366 in the year leading to July 2015.<sup>1209</sup> However, it is the rise in hospital admissions related to malnutrition which are concerning. According to an Office of National Statistics Blog which cites NHS statistics, ‘the figures for admissions with

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<sup>1203</sup> CESCR, ‘Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ (2016) E/C.12/GBR/CO/6’ (n 613) para 53.

<sup>1204</sup> Nicholas VR Jones et al., ‘The Growing Price Gap between More and Less Healthy Foods: Analysis of a Novel Longitudinal UK Dataset’ [2014] PLOS ONE 9(10) <<https://doi.org/10.1371/journal.pone.0109343>>.

<sup>1205</sup> Garthwaite (n 1057) 115.

<sup>1206</sup> *ibid.*

<sup>1207</sup> Just Fair (n 509) 119.

<sup>1208</sup> *ibid.*

<sup>1209</sup> Garthwaite (n 1057) 4.

malnutrition as a secondary diagnosis were 2702 in 2007-08 and 8417 in 2016-17.’<sup>1210</sup> This represents a threefold rise in such admissions over a time period correlating to the implementation of austerity. However, other factors may be at play and eating disorders may also play no small role in this figure.

Even so, these figures represent only those *admitted* to hospital as a result of malnutrition. In reality the number of malnourished people in the UK at any one time is much higher. According to NHS guidance ‘malnutrition is common in the UK, affecting more than three million people ... at any one time.’<sup>1211</sup> In 2014, data showed that ‘8.4 million people in the UK faced not having enough food to eat.’<sup>1212</sup> More recently in 2016 the CESCR has raised concern about ‘increasing levels of food insecurity, malnutrition...and the lack of adequate measures to reduce the reliance on foodbanks’<sup>1213</sup> in the UK. This suggests that levels of malnutrition are rising in the UK.

However, that is not to say that three million people are destitute under the right to food aspect of my human-rights based definition of destitution. This is because not all of those considered medically malnourished are so due to a lack of capabilities to secure adequate nutritious food. As was highlighted above malnutrition can also include obesity, and this is one example of malnutrition which is not *always* caused by failures in the realisation of the right to food. Other examples may include people choosing to eat a diet which restrict the types of food one can eat and doing so in such a way as to inadequately consume the nutrients to stave off

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<sup>1210</sup> Myer Glickman, ‘Deaths Involving Malnutrition Have Been on the Rise. NHS Neglect Is Not to Blame’ (2018) <<https://blog.ons.gov.uk/2018/02/14/deaths-involving-malnutrition-have-been-on-the-rise-but-nhs-neglect-is-not-to-blame/>> accessed 22 June 2019.

<sup>1211</sup> Siobhan Lendzionowski et al., ‘Guidance – Commissioning Excellent Nutrition and Hydration 2015-2018’ (NHS England, 2015) <<https://www.england.nhs.uk/wp-content/uploads/2015/10/nut-hyd-guid.pdf>> accessed 22 June 2019.

<sup>1212</sup> Taylor and Loopstra (n 1093) 9.

<sup>1213</sup> CESCR, ‘Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ (2016) E/C.12/GBR/CO/6’ (n 613) para 53.

malnutrition. As such it may be difficult to determine the exact numbers of individuals who are malnourished by way of destitution. Even so, as the preceding analysis throughout this right to food section has made clear the use of foodbanks is an indicator of destitution for which numbers can be more definitively and confidently reached.

Even so, the minimum core obligation of the right to food goes beyond the avoidance of malnourishment alone. The CESCR also considers the core content of the right to imply that food is both available ‘in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture’<sup>1214</sup> and accessible ‘in ways that are sustainable and that do not interfere with the enjoyment of other human rights.’<sup>1215</sup>

Similarly, to levels of malnutrition there has been a marked increase in foodbank usage correlating to the implementation and continuation of austerity.<sup>1216</sup> This has been labelled a ‘foodbank explosion.’<sup>1217</sup> The Trussell Trust is the main provider of foodbanks in the UK.<sup>1218</sup> Given the scale of this organisation and the fact that it collects and publishes data the analysis in this sub-section will focus on the Trussell trust in order to analyse foodbank trends in the UK. This excludes other providers of foodbanks from the analysis. However, the purpose is not to show exactly how many people are destitute under my human rights-based definition in the UK but to instead explore the conditions leading to such destitution under the right to food. This is with the purposes of informing recommendations in chapter 7.

As I contended in section 6.3. above, when individuals must rely on charitable

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<sup>1214</sup> CESCR, ‘General Comment No. 12: The Right to Adequate Food (Art.11) (1999) UN.Doc. E/C.12/1995/5’ (n 503) para 8.

<sup>1215</sup> *ibid.*

<sup>1216</sup> Livingstone (n 1136) 189.

<sup>1217</sup> Garthwaite (n 1057) 2.

<sup>1218</sup> HRW (n 1047) 1.

assistance to realise their right to any of the component rights the level of their realisation is below that of the destitution threshold. This can be supported further with Royston's suggestion that 'outright destitution' includes being unable to keep 'food on the table'<sup>1219</sup> and this notion is also a feature of Loopstra et al's work labelling food insecurity one form of destitution.<sup>1220</sup>

As I demonstrated in chapter 2.4.3., insecurity of access – that is precariousness – is one aspect of the destitution theme of vulnerability. As such, food bank usage can aid as a guide for contributing to determining an estimate of the number of people who are destitute in the UK under my human rights-based definition of destitution.

Between 2009-2017, the Trussell Trust has increased the number of foodbanks it operates from 30 to 420 made up of 1,350 distribution centres.<sup>1221</sup> Accounting for non-Trussell Trust operated foodbanks brings the number of foodbanks in the UK to over 2,000.<sup>1222</sup> The rocketing number of foodbanks in the UK evidences that 'a broad base of people in the UK do not currently have their potential human rights, as listed in ICESCR, fulfilled.'<sup>1223</sup> Since Bell and Cemlyn's 2014 paper which contained these words the problem has only grown in size with greater numbers of people relying on foodbanks to obtain food. Such individuals are destitute under my definition and as such this necessarily implies that destitution under the component right of the right to food is growing in the UK.

In the decade leading up to 2018 the number of emergency food parcels dispensed by

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<sup>1219</sup> Royston (n 1053) 313.

<sup>1220</sup> Rachel Loopstra et al., 'Family Hunger in Times of Austerity: Families Using Food Banks across Britain' (Sheffield Political Economy Research Institute Interdisciplinary Centre of the Social Sciences 2018) 11 <<http://speri.dept.shef.ac.uk/wp-content/uploads/2018/11/SPERI-Brief-32-Family-hunger-in-times-of-austerity.pdf>> accessed 18 June 2019.

<sup>1221</sup> Loopstra and Lalor (n 1089) 2.

<sup>1222</sup> Alston, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the United Kingdom of Great Britain and Northern Ireland' (n 5) para 22.

<sup>1223</sup> Bell and Cemlyn (n 47) 829.

the Trust increased by 5,146% from 26,000 to 1.33 million.<sup>1224</sup> After accounting for those who received such food parcels more than once, in 2014/2015 it is ‘estimated that about 500,000 different people in the UK received food assistance.’<sup>1225</sup> This would suggest that half a million people were destitute under the right to food aspect of my definition alone during that period. However, the number may in fact be higher. This is because, as was highlighted in section 6.3.3. above, limits exist with accessing food from the Trust. This may mean that some of those who need food aid to realise the substantive content of the right to food do not receive such aid. More so, this figure only accounts for food parcels delivered by the Trussell Trust. Thus, this figure may be far higher.

The causes of increased foodbank usage – people’s reason’s for turning to foodbanks – can be used to assess the extent to which this figure is indicative of those experiencing destitution under the right to food component. Austerity-influenced social policies have come to be regarded as a key driver in foodbank usage.<sup>1226</sup> Pertaining to hunger, the HRW believes that these policies have ‘made a new and growing problem worse’<sup>1227</sup> and has stated that in practice benefit sanctions often result in individuals going without food.<sup>1228</sup> As well as this the Work and Pensions Secretary has now acknowledged the link between increased demand for foodbanks and the implementation of Universal Credit<sup>1229</sup> which is a policy reforming social security. HRW contends that the UK government ignored warnings that growing hunger was correlated to the roll-out of universal credit.<sup>1230</sup>

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<sup>1224</sup> HRW (n 1047) 1.

<sup>1225</sup> Taylor and Loopstra (n 1093) 6.

<sup>1226</sup> Lambie-Mumford (n 1043) 9; Rachel Loopstra et al., ‘Austerity, Sanctions, and the Rise of Food Banks in the UK’ [2015] BMJ 2 <<https://www.bmj.com/content/bmj/350/bmj.h1775.full.pdf>> accessed 20 June 2019.

<sup>1227</sup> HRW (n 1047) 104.

<sup>1228</sup> *ibid* 76.

<sup>1229</sup> Alston, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the United Kingdom of Great Britain and Northern Ireland’ (n 5) para 47.

<sup>1230</sup> HRW (n 1047) 84.

However, the individual and cumulative impact of earlier policies have also led to increased foodbank demand. Benefit payment caps, the spare room subsidy, and restricting access to sickness benefits have also driven increased demand.<sup>1231</sup> Alongside these policies, Garthwaite also highlights benefit delays and sanctions in contending that these austerity-influenced policies are cited by almost 50% of those using foodbanks as their reason for being there.<sup>1232</sup> Thus it is clear that there exists a correlation between the rise in foodbank use and changes to the welfare state.<sup>1233</sup> This can be supported in that, whilst making up 9% of the working age population, one study has found that out-of-work benefit recipients make up 69.6% within its sample and ‘this highlights how out-of-work benefit claimants are over-represented among food bank users by seven times.’<sup>1234</sup> This can be linked to my contention in chapter 5.6. that austerity since 2010 – especially in regard to social security policies – has been inherently destitution inducing.

#### ***6.4.5. The Right to Clothing***

Despite the fact that the minimum core obligation of the right to clothing has not been determined expressly, the normative content can serve as a guide in assessing the adequacy of clothing. The JRF determines that for the purposes of avoiding destitution, clothing and footwear should be appropriate for the weather.<sup>1235</sup> This aligns with my own analysis of the normative framework of the Right to Clothing above.<sup>1236</sup> In the UK, there exists no comprehensive data set which captures the information required to determine the extent to

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<sup>1231</sup> Lambie-Mumford (n 1037) 124.

<sup>1232</sup> Garthwaite (n 1057) 8.

<sup>1233</sup> Lambie-Mumford (n 1037) 28.

<sup>1234</sup> Loopstra and Lalor (n 1089) 24.

<sup>1235</sup> Glen Bramley et al., “‘Destitution in the UK’ - Technical Report’ (2016) 5 <[https://pureapps2.hw.ac.uk/ws/portalfiles/portal/10667077/DESTITUTION\\_TECHNICAL\\_REPORT\\_FINAL.pdf](https://pureapps2.hw.ac.uk/ws/portalfiles/portal/10667077/DESTITUTION_TECHNICAL_REPORT_FINAL.pdf)> accessed 7 February 2020.

<sup>1236</sup> See chapter 4.3.2.

which people's clothing fulfils these criteria. However, one area in which research has been undertaken in regard to clothing by both the UK Government<sup>1237</sup> and Civil Society is that of school uniforms. Therefore, although a consideration of school uniforms will not necessarily capture the full extent of destitution relating to the right to clothing in the UK, an analysis of the extent to which parents are able to provide their children with school uniforms that are correct, clean, and properly-fitting in the UK will be useful to my analysis of destitution. Royston and Jacques estimate that 'around 2 million children across England go to school wearing incorrect, unclean or ill-fitting uniform.'<sup>1238</sup>

Given the insufficiency of literature with regard to the right to clothing, any discussion of the right to clothing beyond the context of school uniforms is naturally speculative in nature. However, this speculation is informed by the discussion of the normative content so far. The implications which may be imputed from the finding that around 2-million children in England alone go to school wearing incorrect, ill-fitting or unclean uniform are severalfold. The former two of these findings suggest that issues of affordability exist with regard to accessing uniforms. The latter finding – pertaining to unclean uniform – suggests that although individuals are able to afford uniform, they may not be able to afford the cost of conventionally cleaning uniforms for example not owning a washing machine or having funds to pay for the electricity of running a machine.<sup>1239</sup>

However, wider inferences may be drawn from this. This is because it can be strongly imputed that if a family unit is unable to afford the cost of washing school uniforms it is also unable to afford the cost of washing the clothing of other members of the family unit. The same may be said of ill-fitting clothing. Thus, with the exception of those who are wearing incorrect

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<sup>1237</sup> Davies (n 1114).

<sup>1238</sup> Royston and Jacques (n 1107) 7.

<sup>1239</sup> See (n 1181-1182)



uniform, it can be speculated that each of those two-million children is representative of a larger number of individuals within the family unit who are affected by similar issues. As I made clear in chapter 4.3.2. unclean and ill-fitting clothing can have damaging effects upon the health of individuals and, more so, causes clothing to fail to meet the destitution threshold.

#### ***6.4.6. The Right to an Adequate Standard of Living***

The analysis throughout section 6.3. and section 6.4. demonstrates the extremely strong links between the five aspects of the AAAAQ framework in the UK context. The relationship between availability, affordability, accessibility, acceptability, and quality is interwoven and circular. Each aspect of this AAAAQ framework is affected by and affects the others. It is clear that the current situation in the UK is one in which the normative content of the component rights is undermined in a multitude of ways. Regardless of whether individuals can attain the physical substance of their component rights, I have contended in section 6.3. that the destitution threshold is not surpassed unless this physical substance is attained in a way which conforms to the AAAAQ framework. Consequently, the fact that realisation of this normative (AAAAQ) content of the component rights is undermined is indicative of destitution. This is because of the intimate links which I have demonstrated between the failure to realise the normative content (AAAAQ) and the concepts of indignity and vulnerability. The analysis of the component rights to housing, water, sanitation, food, and clothing above demonstrates the interdependence and interrelationship between the various component rights.

What is evident from this analysis is that a failure to realise any aspect of the normative content of one component right has implications for the realisation of other component rights. Thus, rights deprivations are multiplied. The situation described throughout these two chapters demonstrates that the right to an adequate standard of living is not being met to the appropriate level for a great many individuals in the UK. A failure to realise any one or more of the component rights to the destitution threshold represents a failure to meet the destitution

threshold of the right to an adequate standard of living. In such instances, the right to social security is envisioned to allow individuals to realise their rights. However, in the UK this is simply not the case.

#### ***6.4.7. The Right to Social Security***

The core obligations pertaining to the right to social security have been clearly defined by the CESCR. These relate to access and adequacy of the right to social security. The right to social security ought to act as a failsafe which, if the realisation of other rights is lacking, comes into action to allow individuals to realise their other rights. Consequently, the level of social security provision that equates to the destitution threshold will vary between states. At a minimum however, social security provision should provide adequate benefits to protect articles 10, 11, and 12 of ICESCR.<sup>1240</sup> In the UK context the minimum income standard<sup>1241</sup> can act as a guide for determining the adequacy of benefits. As is clear from the analysis of this income standard above, benefits in the UK are not adequate enough to allow each of the component rights to be met to the destitution threshold. Destitution arises in the UK ‘when particular groups have social security entitlements that are, temporarily or permanently, inadequate for meeting their essential needs, or from their failing to access these entitlements for a variety of reasons.’<sup>1242</sup>

Universal Credit, was introduced under the Welfare Reform Act 2012,<sup>1243</sup> and the long wait for the first payment has been highlighted as a feature of universal credit which puts people

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<sup>1240</sup> Malcolm Langford, ‘The Right to Social Security and Implications for Law, Policy and Practice’ in Eibe Riedel et al (ed), *Social Security as a Human Right* (Springer-Verlag 2007) 29–53, 33.

<sup>1241</sup> See chapter 6.3.2.

<sup>1242</sup> Fitzpatrick et al. (n 2) 71.

<sup>1243</sup> CESCR, ‘Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ (2016) E/C.12/GBR/CO/6’ (n 613) para 96.

at ‘risk of destitution and eviction.’<sup>1244</sup> Destitution has also been highlighted as being used as punishment via sanctions<sup>1245</sup> which has attracted concern from the CESC.<sup>1246</sup> The whole raft of benefit changes since 2010, especially the Welfare Reform Act 2012 and the Work Act 2016 which are highlighted by the CESC, has resulted in concerned ‘about the adverse impact of these changes and cuts on the enjoyment of the rights to social security and to an adequate standard of living.’<sup>1247</sup> This demonstrates the links between social security and realising the right to an adequate standard of living.<sup>1248</sup> Given that if the right to an adequate standard of living is realised an individual cannot be destitute under my definition, it follows that social security can be firmly linked to the prevention of destitution which in turn is indicative of the potential for alternative social security policies to address destitution.<sup>1249</sup> This links heavily to my contention that changes to social security influenced by austerity since 2010 have been destitution inducing as was addressed in chapter 5.6.

## **6.5. Concluding Remarks: Human Rights Defined Destitution in the UK**

This chapter purports that austerity, as implemented in the UK and examined in chapter 5, is inherently destitution inducing. This contention is based upon the premise that, as the government envisioned and expected the space created by the retreating state to be filled by the ‘big society’, this austerity has fostered a reliance upon ‘social transfers like public and

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<sup>1244</sup> Katie Schmucker, ‘Universal Credit: A Joseph Rowntree Foundation Briefing’ (Joseph Rowntree Foundation 2017) 23  
[<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjh4dOIur\\_nAhUUu3EKHTg8DGAQFjAAegQIBRAB&url=https%3A%2F%2Fwww.jrf.org.uk%2Ffile%2F50089%2Fdownload%3Ftoken%3Daby9j4RF%26filetype%3Dbriefing&usg=AOvVaw31Jp9QEON5pbX5WdQhReKz>](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjh4dOIur_nAhUUu3EKHTg8DGAQFjAAegQIBRAB&url=https%3A%2F%2Fwww.jrf.org.uk%2Ffile%2F50089%2Fdownload%3Ftoken%3Daby9j4RF%26filetype%3Dbriefing&usg=AOvVaw31Jp9QEON5pbX5WdQhReKz)  accessed 7 February 2020.

<sup>1245</sup> Royston (n 1053) 313.

<sup>1246</sup> CESC, ‘Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ (2016) E/C.12/GBR/CO/6’ (n 613) para 40.

<sup>1247</sup> *ibid.*

<sup>1248</sup> See chapter 4.3.7.

<sup>1249</sup> See chapter 7.3.1.

private charities, alms and welfare programmes.’<sup>1250</sup> A reliance upon such transfers is, as was demonstrated in chapter 2, central to the traditional definition of destitution. Albeit framed as an inability to afford for themselves, this is also a shared feature of the JRF definition of destitution. In terms of my human rights-based definition of destitution this reliance has a range of implications for the realisation of the normative content of the component rights. That is a reliance upon the ‘big society’, as opposed to legally guaranteed and enforceable claims versus the state, has implications in regard to the availability, accessibility, affordability, acceptability, and quality of the realisation of each of the component rights. From a failure to ensure the normative content of the component rights, the destitution themes of indignity, and vulnerability are, I argue, inherent to the social policy that is the ‘big society’.

Affordability is a prominent barrier to the realisation of the component rights to the destitution threshold in the UK. Even when it does not act as a barrier to access, an inability to afford fosters a reliance upon charitable assistance and/or results in inadequate realisation of the component rights. The analysis of the right to food and the right to clothing, and in particular food banks and clothes banks, above are perhaps the most cogent and explicit example of this.

Reliance upon charitable assistance may be regarded as a consequence of a state failure to meet its obligations regarding the normative content of affordability of the component rights. More so, this is indicative of failings with regard to the realisation of the right to social security which – if it surpassed the destitution threshold – should ensure that individuals could realise their other component rights. Not only this, but this reliance on social transfers in turn has implications for the availability, accessibility, acceptability, and quality of realisation. Pertaining to availability, this is because, as has been demonstrated above, those providing

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<sup>1250</sup> Gangopadhyay et al. (n 94) 241.

charitable assistance may come to lack the resources to continue delivering such transfers. In regard to accessibility, these providers may operate a gatekeeping system; be geographically or spatially difficult to access; and/or only be accessible at times with are inaccessible to some people. Acceptability and quality are also issues to be considered in this vein. An individual who relies upon charitable assistance has little option but to accept what is given to them regardless of personal, or even public, preference.

Thus, even though a reliance on charitable assistance may well allow survival *needs* to be met such a reliance does not realise survival *rights*. This is because it provides only the physical substance of the right in question and does not provide realisation of the substantive content of the right. When survival needs are, by nature of being met by charitable assistance, met in an undignified manner this leaves those reliant upon such transfers open to indignity and vulnerability. Consequently, based upon the analysis in this chapter, the scale of destitution in the UK is indicative that the UK is failing to comply with some of its obligations under ICESCR. This contention may be supported with reference to the CESCR's latest concluding observations for the UK as well as Alston's report on extreme poverty and human rights in the UK.<sup>1251</sup> The following chapter will examine mechanisms for addressing destitution in the UK.

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<sup>1251</sup> CESCR, 'Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (2016) E/C.12/GBR/CO/6' (n 613); Alston, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the United Kingdom of Great Britain and Northern Ireland' (n 5).

## **Chapter 7: Addressing Destitution in the United Kingdom using Human Rights**

### **7.1. Introduction**

This chapter builds upon the work throughout this thesis to offer human rights-based solutions to destitution for the UK context. Part One of this thesis promulgated my human rights-based definition of destitution and thus far in Part Two this definition has been applied to the UK context. Chapter 6 applied this in identifying how the human rights-based destitution manifests itself: the symptoms.

This chapter will address the potential cure for destitution in the UK. The following section, section 7.2., will highlight the advantages which are generally associated with utilising a Human Rights Based Approach (HRBA). This cure has a number of elements. Section 7.3. will address the alleviation of destitution in the short term. Continuing the medical metaphor, this equates to reactionary treatment – applying a bandage or administering medication. The recommendations in this section are split into two parts. The first focuses on the role social security policy must play in addressing destitution and the second focuses on addressing practical barriers to the realisation of the component rights to a level above that of the destitution threshold.

Section 7.4. goes beyond this to address the eradication of destitution in the UK. That is the immunisation of our society against destitution – preventing destitution from occurring in the first place. This immunisation will be based upon more long term and structural recommendations. These recommendations will focus on the socio-economic duty; human rights budgetary planning; the justiciability of ESCRs; and access to justice.

Both sections 7.3 and 7.4 are based upon the implicit assumption that the non-realisation of the component rights to the destitution threshold is inherently wrong and must be

addressed. I contend that if the recommendations made in this chapter were to be implemented then destitution would only ever rarely, and in the most exceptional circumstances, be experienced in the UK.

## **7.2. The General Advantages of Utilising a Human Rights Based Approach and the Implications of these for Tackling Destitution**

Hunt and MacNaughton highlight that human rights indicators can be used to recognise ‘when national and international policy adjustments are required.’<sup>1252</sup> If my HRBA to defining destitution, and findings of widespread destitution in the UK under this definition are accepted, it follows that this reasoning can be used to argue that policy adjustments are required. This necessitates regarding the prevalence of destitution as a human rights indicator. More specifically, the prevalence of destitution suggests that the component rights are not being realised to the appropriate levels.

At the core of Human Rights Based Approaches (HRBAs) are a number of internationally recognised and interconnected principles.<sup>1253</sup> These are ‘express application of the international human rights framework;’ ‘empowerment;’ ‘participation;’ ‘non-discrimination and prioritization of vulnerable groups; and’ ‘accountability.’<sup>1254</sup> Other principles include transparency, human dignity, and the rule of law.<sup>1255</sup>

This highlights the importance of dignity within the human rights discourse which in turn aligns with my understanding of destitution and its underlying themes one of which – I argue - is dignity.

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<sup>1252</sup> Hunt and MacNaughton (n 415) 305.

<sup>1253</sup> Patrick Twomey, ‘Human Rights-Based Approaches to Development: Towards Accountability’ in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP 2007) 45–69, 49.

<sup>1254</sup> *ibid* 49.

<sup>1255</sup> Just Fair (n 509) 76 This report highlights the ‘human rights principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law’ which are ‘commonly referred to as the “PANTHER” framework.’

As was highlighted in the introduction to this thesis, HRBAs bring with them a number of benefits. That section, however, was framed in terms of justifying utilising a HRBA in relation to destitution. This section goes beyond this to highlight the benefits of a HRBA in *addressing* destitution. A HRBA is ‘based upon two key premises:’<sup>1256</sup> that all individuals are rights holders and that for each right there exists a corresponding duty on states.<sup>1257</sup> This notion of corresponding duty affirms that ‘the state is the primary agency for the enforcement of people’s rights.’<sup>1258</sup> Sepúlveda Carmona contends that under a HRBA recovery, in the context of austerity in response to financial crisis, ‘must start with the most vulnerable and disadvantaged, who are rights-holders rather than burdensome or passive recipients of charity.’<sup>1259</sup> This links explicitly to my examination of destitution in the UK in which I argue that a reliance on charitable assistance to attain the physical substance of the component rights is inherent to the experience of destitution in the UK.<sup>1260</sup>

In the introduction to this thesis, I contended that, *if* a right to be free from destitution could indeed be established, the benefit of this would be to impose a duty upon states to address destitution.<sup>1261</sup> Although I do not contend that an explicit right to be free from destitution exists, I argue that – as was highlighted in regard to poverty above - if explicitly enshrined human rights are realised to the appropriate levels then destitution would not occur. To state explicitly, if the component rights are realised to the destitution threshold then destitution cannot exist under my definition.

HRBAs, inherent to which are participatory processes, empower ‘the poor both to assert

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<sup>1256</sup> Lister (n 29) 112.

<sup>1257</sup> *ibid.*

<sup>1258</sup> Mander (n 135) 246.

<sup>1259</sup> Sepúlveda Carmona (n 979) 42.

<sup>1260</sup> See Chapter 6

<sup>1261</sup> See Chapter 1.2



their human rights and hold accountable those legally responsible for their delivery.’<sup>1262</sup> In essence, therefore, ‘they are enforceable.’<sup>1263</sup> The UNDP also highlights that a HRBA can link ‘the human development approach to the idea that others have duties to facilitate and enhance human development.’<sup>1264</sup> Thus, HRBAs transform certain needs into rights which, given the ‘vertical relationship of human rights law i.e. between the state and the individual,’<sup>1265</sup> mean that those rights are ‘applicable to everyone within that state, including vulnerable groups such as refugees.’<sup>1266</sup> More so, in the context of the UK, where the only current statutory protection against destitution applies only to those subject to the Asylum and Immigration Act, a HRBA to destitution widens protection to include the population more generally.

In relation to human development, Sengupta contends that the value added of a HRBA is ‘the search for accountability leading up to culpability.’<sup>1267</sup> Furthering this point, HRBAs allows for a ‘substantially different approach to deprivation by transforming economic problems into possible rights violations, that is to say into discrimination or structures that prevent people from exercising rights.’<sup>1268</sup> HRBAs necessarily involve identifying chronic and systematic denials of human rights and ‘an analysis of the sources and causes of such denials.’<sup>1269</sup> Thus, HRBAs, unlike other approaches to poverty and destitution, shift the focus to one of altering the conditions that result in deprivation.<sup>1270</sup> Thus, HRBAs offer the chance of structural change. This is a key feature of a HRBA. Such an approach recognises the

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<sup>1262</sup> Twomey (n 1253) 49.

<sup>1263</sup> Paul Spicker, *What’s Wrong with Social Security Benefits* (Policy Press 2017) 112.

<sup>1264</sup> UNDP, *Human Development Report 2000* (n 21) 31.

<sup>1265</sup> Cahill-Ripley (n 666) 390.

<sup>1266</sup> *ibid.*

<sup>1267</sup> Sengupta (n 16) 837.

<sup>1268</sup> Manuel Couret Branco and Pedro Damião Henriques, ‘The Political Economy of the Human Right to Water’ (2010) 42 *Review of Radical Political Economics* 142, 151.

<sup>1269</sup> Mander (n 135) 242.

<sup>1270</sup> Cahill-Ripley and Skogly (n 19) 114.

‘structural causes of people’s impoverishment, of the fact that their condition is the outcome of the active denial of their rights and entitlements by social, economic and political structures and process.’<sup>1271</sup> This recognition would take the existence of destitution to evidence the existence of structures and processes which fail to realise ESCRs.

### **7.3. Using Human Rights to Alleviate Destitution in the Short Term**

As was made clear throughout the previous chapter an individual is destitute if the normative content of one or more of the component rights is not realised to the level of the destitution threshold. The nature of ESCRs is such that there is no prescribed means of realising them as a multitude of options have the potential to contribute the same goal: the realisation of the rights. Consequently, due to temporal and spatial limitations this chapter is unable to address all possible avenues of realisation. Instead, the recommendations of this chapter will focus on, firstly, the role social security can play and, secondly, addressing issues which are specific to the UK context.

#### ***7.3.1. Using the Right to Social Security to Ensure the Immediate Realisation of the Component Rights to the Destitution Threshold***

Given the strong interrelationship between the right to social security and the right to an adequate standard of living and given the status of the component rights (with the exception of the right to social security) as forming constituent elements of the holistic right to an adequate standard of living, I contend that in the short term it is changes to social security policy which are the best placed mechanism to address destitution in the UK. As I made clear above, the right to social security is designed so that it need only be engaged as a failsafe if other ESCRs are not realised. It follows that the right to social security, if properly implemented, would allow individuals to attain the substance of the component rights in a dignified way free from

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<sup>1271</sup> Mander (n 135) 239.

vulnerability. This is because, if an individual could not realise their component rights, they would have recourse to the right to social security, which would then grant them the capability to realise their component rights.

However, currently in the UK the social security systems are not designed with such a goal in mind. The ‘punitive turn’, which was addressed in greater detail above,<sup>1272</sup> has seen welfare conditionality extended and intensified and the rationale underpinning social security in the UK seriously altered. This has resulted in a range of policies, which undermine the capability of those reliant on social security to be able to afford to realise the physical substance of their component rights without additionally relying on charitable assistance. The level at which social security payments are set, the amount of time during which the freeze preventing raises in levels of social security being extended, sanctions, and advanced hardship loans (which must later be paid back reducing future payments) are all examples of this.<sup>1273</sup> Together these policies combine, partially or wholly, and undermine the ability of the social security provision in the UK to achieve the purposes of the right to social security: to ensure an adequate standard of living.<sup>1274</sup>

On account of this, I contend, that social security provision in the UK must be dramatically altered in order to address destitution. Although this would not address the structural issues, which are causally linked to destitution,<sup>1275</sup> this would allow the right to social security to achieve its purpose of ensuring an adequate standard of living and thus shield individuals from – and act as a safety net between individuals and – destitution.

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<sup>1272</sup> See chapter 5.4.

<sup>1273</sup> See section chapter 6.3.2.

<sup>1274</sup> For a more in-depth analysis of the purposes of the right to social security see chapter 4.3.7.

<sup>1275</sup> The following section will address a range of recommendations aimed at addressing structural issues: see section 7.4. 7.4. Eradicating Destitution in the Long term: Addressing the Structures of Destitution utilising Human Rights

Thus, the first recommendation would be to eliminate the deviance between the national minimum wage and the minimum income standard.<sup>1276</sup> This is because the government has aimed to keep social security levels below that of the minimum wage in order to encourage work. Thus, if workers are ensured a minimum income standard, this will reduce and mitigate the need for workers to have their wage-income supplemented by social security to attain this standard. As opposed to *ex post* government policy aimed at redistribution, this may be regarded as a form of predistribution aimed at making work pay better, not by transfer payments and wage-supplements but, by ensuring that work pays enough for individuals in the UK to avoid destitution.<sup>1277</sup>

Additionally, raising the minimum wage would allow for social security levels to be brought closer to the minimum income standard without undermining the policy aim of ensuring that individuals who are able to are better off in work. In the interim, aligning with this policy aim may make increases in social security more palatable following a decade of portraying benefit recipients as undeserving. Following this initial step, social security levels should be raised to the level of the minimum income standard and the policy aim of ensuring that individuals are better off in work should be replaced with a new policy aim by which social security decisions are informed by the obligation to ensure an adequate standard of living. Although other actions would need to be taken, in order to implement these recommendations, there must be an agreeable way of determining the minimum income standard. This must be a politically independent mechanism which regularly and continuously updates this standard,

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<sup>1276</sup> See figures 5.1. and 5.2. in chapter 6.3.2.

<sup>1277</sup> For an overview of redistribution vs predistribution see Chris Grover, 'From Wage Supplements to a "Living Wage"? A Commentary on the Problems of Predistribution in Britain's Summer Budget of 2015' (2016) 36 *Critical Social Policy* 693, 695. Whilst recognising Grover's criticism of predistribution that it does 'little to challenge the exploitative and economically unequal social relations upon which capitalism is premised', I contend that this criticism can be mitigated when considered as part of the package of recommendations made within this chapter.

and the government must commit to at least matching the figure that it determines. Relating to this, as recommended by Royston and Jacques, the ‘benefit freeze’ must be ended.<sup>1278</sup> This is necessary in order for the recommendations relating to a minimum income standard to be achieved as the notion of a ‘benefit freeze’ is antithetical to my recommendation that the level of social security benefit provision be tied to a continuously and regularly updated minimum income standard.

More so, there should be no circumstance in which the government can reduce social security payments to a level below that of the minimum income standard. This recommendation is based upon my contentions that: the minimum income standard is required to avoid destitution; and that destitution undermines the dignity of the individual, is a denial of ESCRs, and may prevent an individual meeting their survival needs. Thus, to deliberately lower social security benefits below the minimum income standard is to deliberately expose individuals to the risk of destitution. Thus, it follows that sanctions, advanced loans which reduce later payments,<sup>1279</sup> and the five-week wait for the first Universal Credit payment are policies and practices which must be terminated. This is because these policies leave individuals with reduced – if any – social security provision for defined periods of time. Not only do these policies take individuals under the minimum income standard for that defined period but also, these policies have longer lasting effects on people’s abilities to meet the minimum income standard. This is due to the fact that individuals undertake survival strategies such as loans which in turn must be paid from future income. In turn this reduces the amount of future income which is left in order to meet the minimum income standard.

Combined, these recommendations would ensure that social security provision in the

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<sup>1278</sup> Royston and Jacques (n 1107) 9.

<sup>1279</sup> Which in turn is intimately tied to the five-week wait for payment under the new Universal Credit System: see chapter 6.4.7.

UK can meet the standards of the Right to Social Security. If these standards are met – and in turn social security in the UK ensures an adequate standard of living – then it follows that it would only be in very rare instances that individuals face destitution.

### ***7.3.2. Addressing Practical Barriers to The Realisation of The Component Rights to The Destitution Threshold in the United Kingdom***

Changes to the provision of social security benefits alone will not suffice and one reason for this is the perverse influence of housing costs. The effect of housing costs can be imputed given the range of methodologies, which seek to arrive at a minimum income figure, or poverty threshold, or in the case of the JRF destitution report destitution level, based on household income *after housing costs*. Thus, it is recommended that the state works to reduce the cost of housing as this would increase an individual's disposable income. One approach to achieving this aim would be to increase the amount of social housing. This is because social housing is priced below that of private renting which in turns acts as a check against the cost of private renting and buying increasing to unaffordable levels. For example, the average rent in the private rental sector 'is almost double the average rent for houses in the social housing sector'.<sup>1280</sup> The importance of social housing in regard to affordability is evidenced given that the reduced income for some sectors of society – such as those who have been disproportionately impacted by austerity<sup>1281</sup> - makes 'affordable housing even more necessary.'<sup>1282</sup> This increased need has been tied to 'increased investment in social housing in order to protect the rights of the most vulnerable.'<sup>1283</sup> Such investment not only acts as a 'safety

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<sup>1280</sup> Hohmann (n 530) 32.

<sup>1281</sup> See section 5.5. Effects of Austerity

<sup>1282</sup> Rooney and Dutschke (n 593) 216–217.

<sup>1283</sup> *ibid.*

net for vulnerable households'<sup>1284</sup> but also has an 'economic stimulus.'<sup>1285</sup> More so, increased levels of social housing interacts with the free market to reduce the cost of private renting. This in turn may reduce living costs and consequently the minimum income standard. Thus, government expenditure on social security benefits per individual in receipt of such benefits may be reduced. In this sense, an investment in social housing offers the potential for long term returns in the form of reduced future expenditure.

Beyond this, given that I have contended that a reliance on charitable assistance to meet the substance of the component rights is a manifestation of destitution in the UK, it follows that so long as charitable assistance providers dispense aid then destitution will continue to exist. That is not however to argue that these providers should be closed immediately. This is because there would undoubtedly be a period of transition whilst recommendations are implemented during which the need for the service currently provided by charitable assistance remains. Although the ultimate aim should be for the demand for the service provided by charitable assistance to cease to exist – resulting in such providers ceasing to operate - in the first instance, the relationship which exists between the rights-holder, charitable assistance, and the government must be recast. This interim measure would address many of the criticisms I have levied against charitable aid provision above.<sup>1286</sup>

This recasting may take the form of the government 'nationalising' existing charitable assistance. By this I mean the government taking over responsibility for overall funding, running costs, staffing, supply chain management, and gatekeeping. Such a recasting would remove the 'charitable' from charitable assistance and as such could be labelled assistance. This would address the destitution theme of vulnerability manifested as precariousness of

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<sup>1284</sup> *ibid* 217.

<sup>1285</sup> *ibid*.

<sup>1286</sup> See 2.2. Existing Definitions of Destitution; see also 6.3. The Normative Content of the Component Rights in the UK

provision, which is inherent to charitable assistance. In this sense, this would constitute a broadening of social security provision to include specific provision for each of the component rights and would result in the relationship during this provision being between the rights-holder and the state. Due to this recast relationship and the recasting of such provision as part of social security entitlements, individuals would have a legal right to challenge – through the tribunal system albeit not necessarily on human rights grounds - the availability, affordability, accessibility, acceptability, and quality of aid provision. This offers the potential for provision which better aligns with human rights standards and, crucially, given that I view this as a broadening of social security provision I contend that individuals relying on governmental aid provision to meet the destitution threshold of their component rights are not destitute. Unlike those relying on charitable assistance.

Such an approach may draw inspiration from the Scottish Government’s response to the unaffordability of school uniforms, which involved implementing a school uniform grant. Not only does this grant provide a model of how the state can work to provide the realisation of the component rights on a general level but also this grant addresses a number of issues, which I highlighted specifically in regard to the right to clothing and destitution above.<sup>1287</sup> As of the 2018-2019 academic year the Scottish Government implemented a minimum level of £100 for this grant, although eligibility will still be determined by local authorities.<sup>1288</sup> Edinburgh council, for example, has seen a sharp rise of 32% of such grants.<sup>1289</sup> However, £100 does not cover the full cost of uniform with the average cost varying from approximately £190-£240 depending on age and gender.<sup>1290</sup> Consequently, as well as there being a need to

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<sup>1287</sup> See section 6.3.2. Affordability

<sup>1288</sup> Anonymous, ‘School Clothing Grant Minimum Set at £100’ (*BBC News*, 25 May 2018) 100 <<https://www.bbc.co.uk/news/uk-scotland-44257672>> accessed 6 September 2019.

<sup>1289</sup> Angie Brown, ‘Sharp Rise in School Uniform Grants in Edinburgh’ (*BBC News*, 4 June 2019) <<https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-48511816>> accessed 6 September 2019.

<sup>1290</sup> See section 6.3.2.



expand this scheme geographically there is also a need to ensure that the level of the grant aligns with the costs of uniforms. This second need can be met in one of two ways – or via a hybrid approach. Firstly, by raising the minimum level of the grant or secondly better regulating the costs of school uniforms. Policies which would contribute to achieving this second goal include banning schools from entering into financially incentivised ‘single supplier contracts’,<sup>1291</sup> standardising some aspects of school uniforms by banning non-standard trousers such as those with a purple lining given as an example in the discussion above,<sup>1292</sup> and ensuring that alternative options are available in regard to parts of the uniform pre-embroidered with school logos which have been found to be three-times more expensive.<sup>1293</sup>

The recommendations in this sub-section and the one preceding it are strongly linked around the theme of social security. Whereas section 7.2. argued for social security payments to be increased, section 7.3. argued for the sphere of social security to be broadened by increasing social housing, nationalising charitable assistance, and utilising grants to ensure the realisation of the component rights to the appropriate levels. However, as was made clear in the introduction to this chapter, these recommendations are aimed at treating destitution and must be supplemented by longer term and structural changes if we are to ensure that destitution cannot occur in the UK.

#### **7.4. Eradicating Destitution in the Long term: Addressing the Structures of Destitution utilising Human Rights**

##### ***7.4.1 The Socio-Economic Duty***

Sustainable Development Goal (SDG) 10 addresses inequality and includes targets to, *inter alia*, ‘adopt policies, especially fiscal, wage and social protection policies’ aimed at

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<sup>1291</sup> See (n 1116)

<sup>1292</sup> See (n 1117)

<sup>1293</sup> See (n 1119)

progressively achieving greater equality.<sup>1294</sup> The UK is expected to achieve the SDGs, including goal 10 ‘whereby governments pledged to ensure equal opportunity and to reduce inequalities of outcome between and within countries.’<sup>1295</sup> For the purposes of this thesis, which focuses on destitution *in the UK*, this requires inequality to be reduced within the UK. Currently, however, ‘the UK does not rank highly when it comes to the commitment to reduce inequality.’<sup>1296</sup>

The inequality which exists in the UK is a result of a discourse which prioritises economic growth over many other policy objectives. Neo-liberal theory holds that ‘the elimination of poverty (both domestically and worldwide) can best be secured through free markets and free trade.’<sup>1297</sup> This is based on the evidence that ‘economic freedom fosters growth-enhancing incentives.’<sup>1298</sup> This aligns with the view that ‘the cure for poverty is economic growth’<sup>1299</sup> and further still the view of the UK that economic growth provides opportunity.<sup>1300</sup> This discourse is premised upon the view that economic growth is central to ‘social, economic, political and environmental progress.’<sup>1301</sup> This further rests on the contention that such growth will benefit all<sup>1302</sup> through reducing disparities and increasing living standards.<sup>1303</sup> This contention has been

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<sup>1294</sup> United Nations Development Programme UNDP, ‘Goal 10 Reduce Inequalities’ (UNDP, 2015) 10 <<http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-10-reduced-inequalities.html#targets>> accessed 28 November 2019.

<sup>1295</sup> Koldo Casla, ‘The Socio-Economic Duty: A Human Rights Remedy against Austerity and Inequality’ (*The Baring Foundation*, 2017) <<https://baringfoundation.org.uk/blog-post/the-socio-economic-duty-a-human-rights-remedy-against-austerity-and-inequality/>> accessed 25 November 2019.

<sup>1296</sup> *ibid.*

<sup>1297</sup> David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 64–65.

<sup>1298</sup> Axel Dreher et al., Martin Gassebner and Lars-HR Siemers, ‘Globalization, Economic Freedom, and Human Rights’ (2012) 56 *Journal of Conflict Resolution* 516, 524.

<sup>1299</sup> Marks (n 137) 572.

<sup>1300</sup> Julian Le Grand et al., ‘The United Kingdom: More and Economic than a Social Europe’ in Jon Kvist and Juho Saari (eds), *The Europeanisation of Social Protection* (Policy Press 2007) 41–60, 41.

<sup>1301</sup> Joachim H Spangenberg, ‘The Growth Discourse, Growth Policy and Sustainable Development: Two Thought Experiments’ (2010) 18 *Journal of Cleaner Production* 561, 561.

<sup>1302</sup> David Kinley, *Civilising Globalisation* (CUP 2009) 43.

<sup>1303</sup> Eleanor M Fox, ‘Globalization and Human Rights: Looking out for the Welfare of the Worst Off’ (2002) 35 *N.Y.U. Journal of International Law and Politics* 201, 209.

labelled the ‘trickle down’<sup>1304</sup> or the ‘rising tide lifts all boats’<sup>1305</sup> theory. Such sentiments implicitly endorse the view that a lack of such growth impedes the realisation of the ESCRs enshrined within the ICESCR.<sup>1306</sup> This is because growth can generate jobs and other resources which in turn can increase an individual’s incomes and reduce living costs. This allows for those at the bottom to benefit from growth at the top. Thus, growth can, theoretically, leave individuals better off.

However, free-trade and a lack of government intervention<sup>1307</sup> benefits some more than it does others<sup>1308</sup> and as such even if growth does lead to ESCRs realisation ‘neo-liberalisation has broadly failed to stimulate *worldwide* growth.’<sup>1309</sup> Under the Washington Consensus ‘the pursuit of growth can only lead to the concentration of wealth.’<sup>1310</sup> This is because growth, and other positive effects of globalisation have been unequally distributed<sup>1311</sup> with larger initial fortunes growing at rates ‘significantly higher than the average growth rate of wealth.’<sup>1312</sup> This links neo-liberalism to inequality, which is growing,<sup>1313</sup> as the gains from globalisation are

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<sup>1304</sup> Harvey (n 1297) 65.

<sup>1305</sup> Kinley (n 1302) 43.

<sup>1306</sup> Ariranga G Pillay, ‘Letter from CESCR Chairperson to All States Party to the ICESCR’ (United Nations 2012) UN. Doc CESCR/48th/SP/MAB/SW.

<sup>1307</sup> Emma Seery and Ana Caistor Arendar, ‘Executive Summary: Even It up: Time to End Extreme Inequality’ (Oxfam 2014) 11 <<https://oxfamlibrary.openrepository.com/bitstream/handle/10546/333012/cr-even-it-up-extreme-inequality-291014-summ-en.pdf;jsessionid=17BC91669378B73387556F2999CAC660?sequence=44>> accessed 10 December 2019.

<sup>1308</sup> Fox (n 1303) 209.

<sup>1309</sup> Harvey (n 1297) 154. Italicised for my own emphasis. Although the growth may not have taken place worldwide the process of neo-liberalisation can be regarded as increasing growth for some states.

<sup>1310</sup> Claire Kumar, ‘Africa Rising? Inequalities and the Essential Role of Fair Taxation’ (Christian Aid 2014) 14 <<http://www.christianaid.org.uk/programme-policy-practice/sites/default/files/2017-05/Africa-tax-and-inequality-report-Feb2014.pdf>> accessed 10 December 2019.

<sup>1311</sup> Fons Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights’ (2011) 11 Human Rights Law Review 1, 2.

<sup>1312</sup> Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014) 431.

<sup>1313</sup> Seery and Arendar (n 1307) 4.

poorly distributed.<sup>1314</sup> This inequality may be deemed irrelevant, regarding ESCRs realisation, if everyone has these rights realised. However, this is not the case with inequality acting as a barrier to tackling poverty<sup>1315</sup> and consequently to the realisation of rights. More so, no empirical evidence supports the claims that prioritising economic growth, and the ensuing inequality, contributes to an improvement in living standards for the most deprived.<sup>1316</sup>

Combined with the contention that ‘rising inequalities are a missed opportunity to end poverty,’<sup>1317</sup> the strong interrelationship between poverty and destitution allows the suggestion to be made that tackling inequality may contribute to tackling destitution in the UK. It is widely accepted that poverty is a form of inequality<sup>1318</sup> and given the strong linkages between poverty and destitution it follows that destitution is also a form of inequality. Furthermore, the context of destitution in the UK, as was addressed in chapter 5 is austerity. In that chapter I contended that austerity in the UK since 2010 has been inherently destitution inducing and has as such increased destitution. The relationship between austerity and inequality parallels this. This is because the reductions in government spending which austerity entails increased unemployment, worsened the recession, and expanded the recession’s length through cutting key social programs at a time when individuals need them most. Given that the relationships between ‘austerity and destitution’ and ‘austerity and inequality’ follow a similar trend it can be contended that these three concepts are linked. This can be supported by the contention that destitution as a sub-set of poverty is a form of inequality. I therefore contend that measures to

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<sup>1314</sup> Fox (n 1303) 210.

<sup>1315</sup> Seery and Arendar (n 1307) 4.

<sup>1316</sup> Alfred De Zayas, ‘Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order’ (United Nations 2016) UNDoc A/71/286 para 13.

<sup>1317</sup> Koldo Casla, ‘The Socio-Economic Duty: A Powerful Idea Hidden in Plain Sight in the Equality Act’ (*OxHRH Blog*, 15 May 2019) <<http://ohrh.law.ox.ac.uk/the-socio-economic-duty-a-powerful-idea-hidden-in-plain-sight-in-the-equality-act>> accessed 25 November 2019.

<sup>1318</sup> Paul Spicker, *Poverty and Social Security* (Routledge 1993) 47.

address inequality in the UK have the potential to also address destitution.

In this respect the socio-economic duty may be of relevance to addressing destitution using human rights in the UK. The Equality Act 2010 includes ‘a positive duty on public bodies in relation to socio-economic disadvantage.’<sup>1319</sup> Section 1 of this act requires relevant authorities to, ‘when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.’<sup>1320</sup> Fredman highlights that the Guidance which accompanies the Equality Act ‘describes socio-economic disadvantage as the state of being disadvantaged in life by one or more of a range of external factors.’<sup>1321</sup> Although poverty, and consequently destitution, is the most important factor, socio-economic disadvantage can be more broadly understood to include ‘the complex interplay of factors such as health, housing, education and family background, and the resulting lack of ambitions and expectations, that so often combine to keep people in poverty and limit their chances of upward social mobility.’<sup>1322</sup>

At first glance this may appear to have little if any correlation to human rights. However, the factors outlined correlate to the substance of a number of human rights including the rights to health, housing, and education. More so, in an article exploring the potential of the socio-economic duty written following the Equality Act, Fredman highlights that such a duty aligns with the view of the CESCR.<sup>1323</sup> This is because in General Comment No.20, the CESCR states that ‘individuals and groups of individuals must not be arbitrarily treated on

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<sup>1319</sup> Sandra Fredman, ‘Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda’ (2010) 3 E.H.R.L.R 290, 290.

<sup>1320</sup> Equality Act 2010 s 1.

<sup>1321</sup> Fredman (n 1319) 296.

<sup>1322</sup> *ibid.*

<sup>1323</sup> *ibid* 294.

account of belonging to a certain economic or social group or strata within society.’<sup>1324</sup> More so, in its 2016 Concluding Observations for the UK, the CESCR recommended ‘that the State party bring into force the relevant provisions of the Equality Act that refer to the public authorities’ duty on socio- economic disadvantage ... in order to enhance and guarantee full and effective protection against discrimination in the enjoyment of economic, social and cultural rights.’<sup>1325</sup> Consequently, section 1 of the Equality Act 2010 has been described as providing a model ‘for enhancing the status of ICESCR in domestic law.’<sup>1326</sup> Thus, it has been argued that the socio-economic duty ‘would contribute to tackling existing disadvantages and inequalities, and protecting socio-economic rights for all people in the UK.’<sup>1327</sup> This demonstrates how the socio-economic duty has the potential to act as a human rights-based mechanism to tackle socio-economic inequality and as a consequence of this human rights-based destitution.

Even so, the socio-economic duty as a tool for tackling socio-economic inequality can be criticised in that ‘the duty specifically excludes “inequalities experienced by a person as a result of being ... subject to immigration control.”’<sup>1328</sup> This is the opposite of the destitution provisions under the Asylum and Immigration Act which were addressed above.<sup>1329</sup> If we were to regard destitution as the ultimate socio-economic inequality then it follows that statutory provisions already exist which are capable of addressing this inequality for those subject to

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<sup>1324</sup> Committee on Economic and Social Rights CESCR, ‘General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)’ (United Nations 2009) UN.Doc. E/C.12/GC/20, para 35.

<sup>1325</sup> Equality and Human Rights Commission EHRC, ‘Progress on Socio-Economic Rights in Great Britain: Update Report on Great Britain’s Implementation of the International Covenant on Economic, Social and Cultural Rights’ (2018) 20 <<https://www.equalityhumanrights.com/sites/default/files/progress-on-socio-economic-rights-in-great-britain.pdf>> accessed 2 December 2019.

<sup>1326</sup> *ibid* 25.

<sup>1327</sup> *ibid* 21.

<sup>1328</sup> Fredman (n 1319) 298.

<sup>1329</sup> See chapter 2.2.

immigration control. It therefore follows that, in relation to destitution, the criticism that the socio-economic duty does not apply to those subjected to immigration controls may be nullified. Rather, the socio-economic duty may be regarded as an alternative statutory means of offering the general population the same protection against destitution as offered under the Asylum and Immigration Act.

Casla argues that the socio-economic duty ‘offers a powerful lever’<sup>1330</sup> to reduce inequality and as such ‘can make a big difference.’<sup>1331</sup> However, I concur with Fredman that despite being a significant step the socio-economic duty is ‘only a small step in the right direction’.<sup>1332</sup> I reach this conclusion based upon a number of factors. Firstly, the socio-economic duty is not yet in effect and as such ‘is technically not binding for public authorities in England.’<sup>1333</sup> This is because, it was written into the Equality Act 2010 that, to take effect ‘this provision requires a formal decision by the Government to activate it, or as is known technically, to commence it.’<sup>1334</sup> No such decision has been taken and consequently ‘successive governments have failed to bring the socioeconomic equality duty into force.’<sup>1335</sup> Thus, all talk of the socio-economic duty can address only its potential.

As well as this, even if it were to be commenced, a number of criticisms of this duty exist which, I believe, undermine its potential to contribute to the realisation of the component rights to the destitution threshold. For example, section 3 of the equality act expressly bars a ‘cause of action at private law’<sup>1336</sup> for ‘a failure in respect of a performance of a duty under section

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<sup>1330</sup> Casla (n 1317).

<sup>1331</sup> Casla (n 1295).

<sup>1332</sup> Fredman (n 1319) 304.

<sup>1333</sup> Casla (n 1317).

<sup>1334</sup> Casla (n 1295).

<sup>1335</sup> *ibid.*

<sup>1336</sup> Equality Act s 3.

1.<sup>1337</sup> Thus, there is no ‘individual right of complaint of discrimination on the grounds of socio-economic disadvantage.’<sup>1338</sup> This limits the potential effectiveness of the socio-economic duty.

This links to the nature of this duty as merely requiring ‘a body only to pay due regard to the *desirability* of exercising its functions in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.’<sup>1339</sup> Thus it is a ‘less intense’ duty as it focuses on *desirability* as opposed to *need*.<sup>1340</sup> Thus, given that proportionality plays a role in determining as to whether due regard has been paid, even if the socio-economic duty were to apply it may be overlooked in favour of attaining other goals. This is because the decision-making body ‘might decide that other priorities outweigh those associated with reducing inequalities of outcome, but if it does, it needs to be able to justify this decision as proportionate in the light of existing evidence.’<sup>1341</sup> This links to the nature of the duty to pay due regard in which the decision maker’s duty is ‘not a duty to achieve a result’ but rather ‘a duty to *have due regard to the need* to achieve these goals.’<sup>1342</sup>

Even so, I contend that these criticisms of the socio-economic duty are outweighed by the benefits of another more crucial role that this duty can play. That is to direct and influence central government policy. Fredman correctly recognises that it is central, as opposed to local government, whose ‘strategic decisions are likely to have a particularly significant impact on socio-economic disadvantage.’<sup>1343</sup> This shows not only the cruciality of central government

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<sup>1337</sup> *ibid.*

<sup>1338</sup> Fredman (n 1319) 303.

<sup>1339</sup> *ibid* 300.

<sup>1340</sup> *ibid.*

<sup>1341</sup> *ibid* 304.

<sup>1342</sup> *ibid* 301 the term need is used here as this quote was specifically in relation to racial discrimination which is framed in terms of need as opposed to desirability.

<sup>1343</sup> *ibid* 297.



policies to tackling socio-economic disadvantage and, as a consequence of tackling this, tackling destitution but also the potential for the socio-economic duty to act as a catalyst for human rights policy planning in the UK. The Equality and Human Rights Commission contend that the negative impact of austerity driven social security cuts ‘could have been analysed and mitigated if decision-makers had paid due regard to the desirability of reducing socio-economic disadvantage when exercising their functions.’<sup>1344</sup> Consequently, the UK’s central government should follow the lead of Scotland which has already enacted Fairer Scotland Duty, which is the name given to the socio-economic duty in Scotland’.<sup>1345</sup> The role that human rights policy planning can play in tackling destitution will be explored in the following section.

#### ***7.4.2. Human Rights Planning in the Budget***

Building upon this discussion of the socio-economic duty, I contend that Human Rights Impact Assessments (HRIAs) are a mechanism by which the socio-economic duty can be brought to life in the UK in such a way as to bolster the realisation of ESCRs. Such budget analysis concerns analysing ‘the process and outcomes of public finances in terms of substantive human rights obligations.’<sup>1346</sup> In the UK, in order to ensure compliance with the Equality Act 2010, Equality Impact Assessments (EQIAs) are undertaken by public authorities to inform decision making. Currently, as was discussed in the previous sub-section, the socio-economic duty is not in effect and as such this duty does not form the focus of such assessments. This is because HRIAs in the UK tend ‘to focus exclusively on the rights contained in the Human Rights Act and the Equality Act’ as ‘public authorities are subject to relatively strong and enforceable legal obligations with respect to these legal instruments.’<sup>1347</sup> Harrison and Stephenson contend

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<sup>1344</sup> EHRC (n 1325) 20–21.

<sup>1345</sup> The Equality Trust, ‘Socio-Economic Duty’ <<https://www.equalitytrust.org.uk/socio-economic-duty>> accessed 11 November 2020.

<sup>1346</sup> Nolan and others (n 98) 18.

<sup>1347</sup> James Harrison and Mary-Anne Stephenson, ‘Assessing the Impact of the Public Spending Cuts: Taking

that these HRIAs ‘could also benefit greatly from explicit consideration of economic, social and cultural rights’<sup>1348</sup> given the prevalence of ESCR issues within their research.

Currently, these instruments are ‘inadequate mechanisms for addressing the underlying social, economic and cultural rights issues which are raised by many public spending measures.’<sup>1349</sup> However, if the socio-economic duty is ‘commenced’ socio-economic inequality – and consequently ESCRs – will more explicitly form a part of HRIAs in the UK. This is because public authorities would be required to pay due regard to these issues when making strategic decisions. Thus, the existing ‘legal standards contained in equality and human rights legislation can be the basis for important examination of public spending decisions, particularly in the context of widespread public spending cuts.’<sup>1350</sup>

Thus, the socio-economic duty offers the prospect of ESCRs being integrated into human rights-based budgetary planning within the UK. HRIA ‘is a recognised term that is used to indicate a process of measuring actual or potential human rights impacts of a policy, project or other form of intervention.’<sup>1351</sup> In relation to ESCRs, the ultimate aim of such assessments is to ‘determine the impact of budgetary decisions on the implementation and enjoyment of ESR.’<sup>1352</sup> Such assessments may be taken *ex post* or *ex ante*.<sup>1353</sup> For my purposes, I focus on the *ex-ante* – that is before the implementation of policy – use of HRIAs as a tool for informing

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Human Rights and Equality Seriously’ in Aoife Nolan et al. (ed), *Human Rights and Public Finance* (Hart Publishing 2013) 219–241, 238.

<sup>1348</sup> *ibid.*

<sup>1349</sup> *ibid.*

<sup>1350</sup> *ibid* 219.

<sup>1351</sup> *ibid* 222.

<sup>1352</sup> Aoife Nolan, ‘Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds), *Human Rights and Public Finance* (Hart Publishing 2013) 41–57, 43.

<sup>1353</sup> Harrison and Stephenson (n 1347) 222.

and altering policy decisions to better align with ESCRs realisation and consequently the combatting of human rights-based destitution.

Such analysis is crucial given that ‘compliance with human rights is never done in a vacuum’<sup>1354</sup> and as such ‘an *appropriate package of economic, social, human, and financial policies* consistent with the aims and goals of human rights’<sup>1355</sup> must be found. Despite the fact that ‘traditionally the budget has been viewed as a technical instrument of public finance management’<sup>1356</sup> it is clear that ‘the budget’ explicitly relates to a decision as to the implementation of such a package. This is because, ‘from a policy perspective, the budget is the financial mirror of government policy.’<sup>1357</sup> The budget is therefore irrevocably interlinked to the policy position adopted by the government. I contend that, given this linkage, if HRIAs are undertaken in designing the budget the implications of this manifest themselves in the implementation of government policy. Specifically, in relation to this thesis, if a government undertakes a HRIA which destitution-proofs (from a human rights-based perspective) its budget then it follows that government policy aligning with this budget will also combat destitution.

Rooney and Harvey propose four conditions which a state must adopt in regard to mainstreaming HRIAs. The first two of these, which are ‘amenable to formal enactment through legislation,’<sup>1358</sup> are a procedural requirement to undertake HRIAs whilst soliciting ‘the

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<sup>1354</sup> Alfredo Sfeir-Younis, ‘Economic and Human Rights – Towards Empowered Development’ in Wenche Barth Eide and Uwe Kracht (eds), *Food and Human Rights In Development: Volume II* (Intersentia 2007) 25–62, 33.

<sup>1355</sup> *ibid.*

<sup>1356</sup> Sheila Quinn, ‘Equality Proofing the Budget: Lessons from the Experiences of Gender Budgeting?’ in Nolan et al. (ed), *Human Rights and Public Finance* (Hart Publishing 2013) 163–192, 163.

<sup>1357</sup> *ibid.* 164.

<sup>1358</sup> Eoin Rooney and Colin Harvey, ‘Eoin Rooney and Colin Harvey ‘Better on the Margins? A Critique of Mainstreaming Economic and Social Rights’ in Aoife Nolan et al. (ed), *Human Rights and the Public Finance* (Hart Publishing 2013) 123–135, 125.

views of affected groups as part of its decision-making processes<sup>1359</sup> and actually carrying out these exercises. The latter two of these conditions have little direct pertinence to legal mechanisms and instead pertain to ‘compliance with the “spirit” of mainstreaming.’<sup>1360</sup> These are to administer HRIAs in good faith and to ‘use the information gathered to select options that maximise the enjoyment of ESR.’<sup>1361</sup> This offers a model for the integration of HRIAs within UK government budgetary planning.

HRIAs which account for the (non)realisation of ESCRs offer ‘a more comprehensive assessment of all financing alternatives.’<sup>1362</sup> As opposed to immediately settling on the hurdle of unaffordability such assessments will force a consideration of further sources of resources for the realisation of ESCRs. For example, ‘(a) reallocations of existing resources, but also through (b) resource generation via fiscal and tax policy (including battling tax evasion), (c) monetary policy and financial regulation, (d) deficit financing, debt restructuring, and (e) development assistance.’<sup>1363</sup> In the context of the UK, the second of these options stands out.

However, concerns have been raised that HRIAs may become, and indeed in their existing form in the UK have become, ‘tick-box’<sup>1364</sup> exercises with their being ‘minimal consultation, limited understanding of key human rights and equality principles and little real impact on decision-making.’<sup>1365</sup> Academic expertise has the potential to play an important role in this regard with it being argued that such expertise ‘could and should be harnessed in order to assist in the development of robust assessment processes that are based on sound evidence

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<sup>1359</sup> *ibid.*

<sup>1360</sup> *ibid* 126.

<sup>1361</sup> *ibid* 125–126.

<sup>1362</sup> Sally-Anne Way et al., ‘Economic and Social Rights in the “Great Recession”’ in Eibe Riedel et al (ed), *Economic, Social and Cultural Rights in International Law* (OUP 2014) 86–110, 93–94.

<sup>1363</sup> *ibid* 94.

<sup>1364</sup> Harrison and Stephenson (n 1347) 229–230; see also Rory O’Connell, ‘Human Rights and Fiscal Oversight: A Case Study of the Northern Ireland 2011–15 Budget’ (2017) 65 *Administration* 83, 97.

<sup>1365</sup> Harrison and Stephenson (n 1347) 229–230.

and proper analysis.’<sup>1366</sup>

#### ***7.4.3. Making Economic, Social, and Cultural Rights Justiciable in the UK***

Even if the socio-economic duty were commenced *and* consideration of ESCRs was therefore integrated into HRIAs within the UK three key areas of challenge exist. These are ‘conceptual’, ‘practical or logistical’, and ‘obstacles faced by practitioners.’<sup>1367</sup> The most crucial challenge, especially given the status of the socio-economic duty even if it were commenced as requiring only consideration – that is its focus on process not outcome – remains the justiciability of ESCRs within the UK.

For the purposes of a 2006 edited collection addressing the justiciability of ESCRs, Coomans defines the concept broadly to mean ‘the extent to which an alleged violation of an economic or social subjective right invoked in a particular case is suitable for judicial or quasi-judicial review at the domestic level.’<sup>1368</sup> More succinctly, justiciability is ‘the ability to bring legal action and receive decision from an independent and impartial body.’<sup>1369</sup> In considering Langford’s conception of judicial review as being composed of ‘recognition’ - that is ‘the degree to which ESC rights are formally enforceable by the judiciary’<sup>1370</sup> – and ‘responsiveness’ – that is ‘the extent to which national courts are willing to entertain petitions in good faith’<sup>1371</sup> it is clear that the justiciability of ESCRs rests on two requirements. Firstly, that ESCRs are given legal status (recognised) and secondly that the courts are willing to

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<sup>1366</sup> *ibid* 240.

<sup>1367</sup> Nolan (n 1352) 42.

<sup>1368</sup> Fons Coomans, ‘Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context’ in Fons Coomans (ed), *Justiciability of Economic and Social Rights* (Intersentia 2006) 1–15, 4.

<sup>1369</sup> Fikire Tinsae Birhane, ‘Justiciability of Socio-Economic Ethiopia: Exploring Conceptual Foundations and Assessing the FDRE Constitution and Judicial Perspective’ (2018) 9 *Beijing Law Review* 322, 322.

<sup>1370</sup> Malcolm Langford, ‘Judicial Review in National Courts: Recognition and Responsiveness’ in Eibe Riedel et al (ed), *Economic, Social and Cultural Rights in International Law* (OUP 2014) 417–447, 419.

<sup>1371</sup> *ibid*.

deliver judgment enforcing the realisation of such rights (responsiveness).

The effective implementation of ESCRs ‘depends in part on whether these rights are treated as justiciable’<sup>1372</sup> and this is due to the fact that it is ‘only when individuals can claim their rights in national courts and find redress can the ESCR of these individuals be realised.’<sup>1373</sup> In fact, adopting mechanisms of enforcement through law and policy has been described as one of the most ‘effective ways of realizing human rights.’<sup>1374</sup>

However, currently, in the UK, ESCRs are not regarded as being justiciable and ‘one of the main arguments against justiciability of socio-economic rights is linked to the issue of *resource allocation in society*’<sup>1375</sup> given that this ‘may have budgetary implications.’<sup>1376</sup> This engages the difficult question that a promotion of ESCRs compliance raises regarding the nature and operation of power in contemporary societies. This is because budget making is regarded as belonging to the political as opposed to legal sphere<sup>1377</sup> given that such decisions ‘relate to policy issues and the implementation of political programmes.’<sup>1378</sup> Consequently, human rights work in this area ‘is directed more explicitly at the political rather than the judicial arena.’<sup>1379</sup> In the UK this has manifested itself in the courts being ‘concerned to be seen as interfering unduly in areas of economic and social policy deemed to be the prerogative of the

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<sup>1372</sup> Margit Tveiten, ‘Justiciability of Socio-Economic Rights: Reflections on Norwegian and South African Debate and Experience’ in Wenche Barth Eide and Uwe Kracht (eds), *Food and Human Rights Development: Volume I* (Intersentia 2006) 163–185, 163.

<sup>1373</sup> Yves Berthelot, ‘Economics and Human Rights – Two Separate Worlds?’ in Wenche Barth Eide and Uwe Kracht (eds), *Food and Human Rights Development: Volume II* (Intersentia 2007) 3–23, 19.

<sup>1374</sup> Birhane (n 1369) 322.

<sup>1375</sup> Tveiten (n 1372) 170.

<sup>1376</sup> *ibid.*

<sup>1377</sup> Quinn (n 1356) 165.

<sup>1378</sup> Coomans (n 1368) 4–5.

<sup>1379</sup> Rory O’Connell, ‘Recovering the History of Human Rights: Public Finances and Human Rights’ in Aoife Nolan et al. (ed), *Human Rights and Public Finance* (Hart Publishing 2013) 107–122, 120.

legislature’<sup>1380</sup> even in instances where the court had recognised ‘that the government had failed to assess the discriminatory effects of its emergency budget law.’<sup>1381</sup> Consequently, despite there having been opportunities to do so, the UK courts have not shown responsiveness to ESCRs which in turn has undermined the justiciability of these rights within the UK.

In the UK context, this lack of responsiveness can in part be traced to the complex interplay of constitutional principles, to which if added constitutionalised ESCRs would further complicate. Regarding the budget as the sole prerogative of the political realm aligns with the constitutional principle of the separation of powers whereas allowing ESCRs justiciability would conflict with the mainstream understanding of this principle.<sup>1382</sup> This is because if ESCRs were justiciable this would allow the courts the competence to ‘decide on matters of social and economic policy involving competing interests and budgetary allocations.’<sup>1383</sup> This in turn would see ESCRs appearing ‘to replace democratic debate with rigid commands.’<sup>1384</sup> Thus, the issue of democracy is raised and making ESCRs justiciable ‘may be undemocratic’ due to the tendency to judicialize social issues which in turn requires the courts to interfere in the political sphere.<sup>1385</sup> Given the redistributive nature of ESCRs, some argue that ‘attributing the power to judges to substitute their own views for those of democratically elected representatives is deeply problematic.’<sup>1386</sup>

Even so, the judiciary is ‘already involved in a range of issues which have important

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<sup>1380</sup> Way et al. (n 1362) 104.

<sup>1381</sup> *ibid.*

<sup>1382</sup> Helena Alviar Garcia, ‘Distribution of Resources Led by Courts: A Few Words of Caution’ in Helena Alviar Garcia et al. (ed), *Social and Economic Rights in Theory and Practice* (Routledge 2015) 67–84, 67.

<sup>1383</sup> Christian Bjørnskov and Jacob Mchangama, ‘Do Social Rights Affect Social Outcomes?’ (2019) 63 *American Journal of Political Science* 4 52, 455.

<sup>1384</sup> Sandra Liebenberg and Katharine G Young, ‘Adjudicating Social and Economic Rights’ in Helena Alviar Garcia et al. (ed), *Social and Economic Rights in Theory and Practice* (Routledge 2015) 237–257, 238.

<sup>1385</sup> Tveiten (n 1372) 178.

<sup>1386</sup> Anne Smith and Eithne McLaughlin, ‘Delivering Equality: Equality Mainstreaming and Constitutionalisation of Socio-Economic Rights’ (2010) 61 *N. Ir. Legal Q.* 93, 105.

resource implications'<sup>1387</sup> which in turn 'makes their role in socio-economic cases more tenable.'<sup>1388</sup> Thus, it can be suggested that separation of powers arguments in this regard are overstated. Such arguments are especially overstated given that, as will be demonstrated in the following sub-section, the judiciary in the UK is already involved in hearing cases related to the substance of some of the component rights - albeit not from a human rights-based perspective. The example of challenging a benefit decision through the tribunal system shows how the right to social security's substance is justiciable albeit not in the language of human rights but instead via statutory entitlement. The ability of those subject to the Asylum and Immigration Act to challenge destitution further evidences that the court system in the UK already has experience dealing with destitution. Not only this, but the arguments made against ESCRs with regard to judges allocating resources are not raised against the judiciary's role in making decisions with regard to Civil and Political Rights which also have a budgetary impact. For example, it has been argued that the cases of *Airey* and *Steel and Morris* relating to the right to a fair trial under Article 6 of the ECHR were decided by the ECtHR regardless of, and ignoring, 'the economic consequences for the government.'<sup>1389</sup>

Additionally, other arguments can be made in favour of explicitly recognising ESCRs as justiciable. Davis argues that a commitment to ESCRs

'in a constitutional democracy rests on an assumption that a society whose government and legal order must reflect the will of the people ... cannot expect a significant proportion of the people to submit themselves to a governance system without a guarantee of conditions that enable each citizen to participate meaningfully in the

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<sup>1387</sup> *ibid.*

<sup>1388</sup> *ibid.*

<sup>1389</sup> Shirley Shipman, 'Steel and Morris v United Kingdom: Legal Aid in the European Court of Human Rights' (2006) 25 Civil Justice Quarterly 5, 18.



political life of the society.’<sup>1390</sup>

Therefore, it can be suggested that a society which does not offer such protections – perhaps in the form of ESCRs – does not reflect the will of the people and is consequently undemocratic. More so, O’Cinneide highlights the ‘enforceable social rights hypothesis.’<sup>1391</sup> This hypothesis contends that ‘the process of constructing a rights-based constitutional democracy will remain incomplete as long as individuals do not enjoy the protection of justiciable social rights.’<sup>1392</sup> This point can be restated given that the justiciability of ESCRs has been described as being ‘an example of how court interference in parliamentary and executive action and discretion is sometimes necessary in order to contribute to democracy.’<sup>1393</sup> Thus, contrary to the primary objections to the justiciability of ESCRs, it can be contended that the justiciability of ESCRs bolsters – as opposed to undermines – democracy.

One means of making ESCRs justiciable in the UK would be through statute. This would be a recognition of the justiciability of ESCRs. However, given the sovereignty of parliament if one government were to enact legislation making ESCRs justiciable another government could just as easily undo this legislation. More so, given the discussion of Separation of Powers and the political characterisation of ESCRs discussed above, it is clear that such an approach may only ensure recognition of ESCRs and not responsiveness by the courts. Therefore, I argue that the goal of ESCRs advocate within the UK ought to be the Constitutionalisation of ESCRs.

Currently the UK has no written constitution. However, a ‘constitutional moment’

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<sup>1390</sup> Dennis M Davis, ‘The Scope of the Judicial Role in the Enforcement of Social and Economic Rights’ in Helena Alviar Garcia et al. (ed), *Social and Economic Rights in Theory and Practice* (Routledge 2015) 197–215, 197.

<sup>1391</sup> Colm O’Cinneide, ‘The Constitutionalization of Social and Economic Rights’ in Helena Alviar Garcia et al. (ed), *Social and Economic Rights in Theory and Practice* (Routledge 2015) 258–276, 271.

<sup>1392</sup> *ibid* 258–276, 271.

<sup>1393</sup> Tveiten (n 1372) 184.

offers the potential to partially reshape the UK's constitutional make up and deliver a written constitution which in turn would empower the courts to act responsively to ESCRs claims. This is especially important given that the enforcement of social welfare rights has been argued to depend 'on the willingness of the constitutional judiciary to engage in reviewing the constitutionality of legal rules related to welfare rights.'<sup>1394</sup> From this, it can be suggested that it will be the willingness of the courts to enforce any constitutionalised ESCRs which will determine the extent to which such rights are enforced. At the time of submitting this thesis in summer 2020 both the ramifications of COVID-19 and Britain's looming Exit from the European Union may well form the basis for such a moment. Harvey et al. highlight an enforceable Bill of Rights for Northern Ireland as one approach to ensuring explicit protections for EU standards across a number of fields including ESCRs following Britain's exit from the EU. They further argue that 'a Bill of Rights should include protections for socio-economic rights that closely mirror the provisions set out in the EU Charter (and preferably ICESCR).'<sup>1395</sup> This could form the basis of a UK wide response which entrenches ESCRs within a new constitution.

Giving ESCRs constitutional status would signal 'that such rights belong to a category of fundamental minimal entitlements.'<sup>1396</sup> Dissimilarly to enshrining ESCRs in ordinary legislation, the method of constitutionalising ESCRs 'gives the courts the power to challenge, veto and, in some instances, strike down social and other incompatible/unconstitutional legislation.'<sup>1397</sup> Thus, constitutional bindingness obviously implies 'that findings of non-compliance have consequences for the required and permitted conduct, and so presumably for

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<sup>1394</sup> Reneta Uitz and András Sajó, 'A Case for Enforceable Constitutional Rights? Welfare Rights in Hungarian Constitutional Jurisprudence' in Fons Coomans (ed), *Justiciability of Economic and Social Rights* (Intersentia 2006) 97–127, 126.

<sup>1395</sup> Colin J Harvey et al. and Brexit Law NI (Research project), *Brexit and Socio-Economic Rights* (2018) 27.

<sup>1396</sup> Smith and McLaughlin (n 1386) 104.

<sup>1397</sup> *ibid.*

the actual, ensuing behaviours, of actors in state and society.’<sup>1398</sup>

Relating back to the argument that making ESCRs justiciable can bolster democracy, such an approach may be regarded as viewing constitutionalisation as a process of allowing the courts to enhance democracy and accountability.<sup>1399</sup> This is because constitutionalisation provides for an ‘adjudicative forum/space’ in which individuals and groups can seek governmental accountability.<sup>1400</sup> It therefore follows that the argument that making ESCRs justiciable undermines democracy can be refuted.

#### ***7.4.4. Enhancing Capability to Enforce Claims to Existing Legal Entitlements***

As the preceding section makes clear, enhancing the legal entitlements and protections (legal rights)<sup>1401</sup> against destitution is crucial to eliminating destitution in the long term. However, legal rights alone are not enough. This is because legal rights can only be effective if they are claimed by individuals. Regardless of which approach, for example *inter alia* the approaches in the previous sub-sections, is taken in regard to enhancing legal protection against destitution, in order to claim legal rights individuals must firstly know (or have the opportunity to find out) the extent of their legal rights and secondly individuals must have the capability to enforce these legal rights. This is because, in relation to social security, ‘no level of benefit, however, will prevent destitution if people are unable to access their entitlements.’<sup>1402</sup> This argument can be extrapolated from the example of social security alone to state that no provision of legal rights aimed at preventing destitution will achieve this aim if people are unable to enforce their rights. Thus, ‘to make a legal definition more meaningful, individuals need to be able to enforce

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<sup>1398</sup> Frank I Michelman, ‘Constitutionally Binding Social and Economic Rights as a Compelling Idea’ in Helena Alviar Garcia et al. (ed), *Social and Economic Rights in Theory and Practice* (Routledge 2015) 277–294, 281.

<sup>1399</sup> Smith and McLaughlin (n 1386) 107.

<sup>1400</sup> *ibid* 106.

<sup>1401</sup> The term legal rights is used here to refer to justiciable rights within the UK and should not be confused with international human rights law

<sup>1402</sup> McKeever et al. (n 1) 76.

their right to be free from destitution. This requires access to justice (A2J), which itself is frustrated by the experiences of destitution.’<sup>1403</sup>

Given the cruciality of adequate social security to combatting destitution in the UK, which I have addressed above,<sup>1404</sup> in this respect I will focus on A2J specifically in relation to social security entitlements. Given the complexity of the law on social security entitlements in the UK individuals ‘frequently require legal help’<sup>1405</sup> when they face problems accessing these benefits. This is in part due to claimants’ lack of awareness, which may be compounded by ‘evidence of inconsistencies within the system.’<sup>1406</sup> Consequently, ‘there is a clear role for expert advice in helping people understand their potential social security entitlements and to navigate the application process.’<sup>1407</sup>

This analysis aligns with the recommendations of a report addressing ‘Destitution and Paths to Justice,’<sup>1408</sup> commissioned by the Joseph Rowntree Foundation. As well as the recommendation to establish ‘primary legislation to establish a clear definition of destitution and a duty on public authorities to protect all persons lawfully present in the UK from destitution’,<sup>1409</sup> which aligns with my analysis in the previous section, this report recommends placing the ‘government under a positive duty to ensure that individuals are receiving the benefits they are entitled to.’<sup>1410</sup> This recommendation pertains to social security and can be interpreted as negating the need for individuals themselves to know the extent of their legal

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<sup>1403</sup> *ibid* 9.

<sup>1404</sup> See chapter 7.3.1.

<sup>1405</sup> Bach Commission, ‘The Right to Justice: The Final Report of the Bach Commission’ (Fabian Society 2017) 29 <[http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission\\_Right-to-Justice-Report-WEB.pdf](http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf)> accessed 5 December 2019.

<sup>1406</sup> McKeever et al. (n 1) 7.

<sup>1407</sup> *ibid*.

<sup>1408</sup> McKeever et al. (n 1).

<sup>1409</sup> *ibid* 75.

<sup>1410</sup> *ibid* 76.

rights to social security. This is because such a duty places the onus on the government to ensure that individuals gain the benefits they are entitled to whereas currently the inverse is true. Such a duty would therefore require the government to address barriers to individuals accessing their full social security benefit entitlement.<sup>1411</sup> Given the cruciality of the realisation of the right to social security to the realisation of the right to an adequate standard of living which I have stressed throughout this thesis,<sup>1412</sup> entrenching such a duty in UK law has the very real potential to address destitution providing that other recommendations pertaining to the right to social security are met.

However, such a recommendation only addresses the need for individuals to know their legal rights pertaining to destitution. This does not address the need to ensure that individuals have the capability to enforce their legal rights, which protect against destitution. The Equality and Human Rights Commission has highlighted CESCER concerns regarding a lack of A2J in relation to social security sanctions.<sup>1413</sup> This concern is rightly justified given that ‘major social security reforms and an increasingly punitive approach from DWP have led to a sharp rise in inaccurate decisions and benefit sanctions.’<sup>1414</sup> For example, some benefits have a 70% success rate on appeal<sup>1415</sup> and this suggests that for those benefits 70% of the decisions, which go to appeal are incorrectly decided in the first instance. This demonstrates the extent to which individuals are not receiving their full entitlement and is especially concerning given that with A2J individuals risk facing a double injustice as they may face ‘the consequences of a poor decision by a public authority and then have no means to rectify it through access to legal

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<sup>1411</sup> *ibid* 9.

<sup>1412</sup> See chapter 4.3.7.; See also chapter 5; See also section 7.3.1

<sup>1413</sup> EHRC (n 1325) 69.

<sup>1414</sup> Bach Commission (n 1405) 29–30.

<sup>1415</sup> McKeever et al. (n 1) 7.

support.’<sup>1416</sup>

Without such support individuals may enter into a state of destitution. For example, a study conducted by Organ and Sigafoos found that ‘many participants reported significant financial deprivation as a result of trying but not being able to resolve their legal issues.’<sup>1417</sup> For some this resulted in an inability to ‘afford food, adequate housing or other essentials.’<sup>1418</sup> This demonstrates how a lack of capability to enforce their existing legal rights undermines the realisation of the substance of those same legal rights. A lack of A2J in this example results in individuals being unable to access their full entitlement – if any of it at all.

Not only does a lack of A2J in relation to social security law expose individuals to (the risk of) destitution but a lack of A2J in this area mirrors a key theme which I have extracted as being central to the destitution experience: a reliance on charitable assistance. Organ and Sigafoos highlight that ‘participants relied on charities and voluntary organisations for advice.’<sup>1419</sup> I have, in greater detail above,<sup>1420</sup> highlighted the incompatibility of charitable assistance as a means of realising the substance of rights, however this study highlights the limited scope and availability of such advice.<sup>1421</sup> Even despite this assistance, individuals have often sought to represent themselves or have felt ‘forced to take no action.’<sup>1422</sup> In sum, a lack of A2J in this area in the form of legal advice has undermined the ability of individuals to enforce their social security entitlements.

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<sup>1416</sup> Bach Commission (n 1405) 29.

<sup>1417</sup> James Organ and Jennifer Sigafoos, ‘The Impact of LASPO on Routes to Justice’ (2018) Equality and Human Rights Commission’ (Equality and Human Rights Commission 2018) 6 <<https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>> accessed 3 December 2019.

<sup>1418</sup> *ibid.*

<sup>1419</sup> *ibid* 35–36.

<sup>1420</sup> See chapter 2.2.; See also chapter 6.3.

<sup>1421</sup> Organ and Sigafoos (n 1417) 35–36.

<sup>1422</sup> *ibid.*

This can be traced to austerity influenced cuts to legal aid. Legal aid, ‘defined as government-funded legal support for people who are unable to pay for legal advice or representation, subject to certain eligibility criteria’<sup>1423</sup> is a key vehicle for ensuring that individuals can access the legal advice they need to enforce their rights and consequently to access justice. Aimed at reducing government spending on legal aid and ‘primarily designed to achieve fiscal deficit reduction’<sup>1424</sup> some provisions of The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 removed many social welfare law cases from the scope of legal aid, including inter alia, most cases concerning housing, social security, debt and employment.<sup>1425</sup> This is despite the fact that ‘the Government accepted in its initial consultation on LASPO that the removal of legal aid for most welfare benefits matters was likely to have a disproportionate impact on disabled people.’<sup>1426</sup> Targeted at saving between £400 and £450 million annually savings of about £950 million annually were actually made.<sup>1427</sup> This constitutes an annual underspend of the legal aid budget of £0.5billion.<sup>1428</sup> Thus the savings made by reforms to legal aid have been more extensive than those that were anticipated when the legislation restructuring legal aid was passed.<sup>1429</sup>

Civil legal aid for welfare benefits advice was cut by ‘100 per cent’.<sup>1430</sup> That is to mean, therefore, that no legal aid provision is available for welfare benefit advice or legal representation as ‘the area of welfare benefits was removed from the scope of legal aid apart

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<sup>1423</sup> *ibid* 1.

<sup>1424</sup> Gina Heung, ‘The Underprivileged See No Light in LASPO Act 2012’ (2017) 5 UK L Student Rev 23, 24.

<sup>1425</sup> EHRC (n 1325) 70.

<sup>1426</sup> Organ and Sigafos (n 1417) 13.

<sup>1427</sup> Henry Brooke and Terence Etherton, ‘The LASPO Review: My Recent Talk about the Bach Commission’s Report on the Right to Justice’ (2018) 6 Birkbeck L Rev 1, 7.

<sup>1428</sup> *ibid*.

<sup>1429</sup> Organ and Sigafos (n 1417) 15.

<sup>1430</sup> Steve Hynes, ‘Austerity Injustice’ (2013) 21 Journal of Poverty and Social Justice 97, 98.

from appeals to the Upper Tribunal and above on a point of law.’<sup>1431</sup> Previously, before LASPO, legal aid allowed for funded help to provide ‘specialist advice and casework to support people in appealing a decision about benefits eligibility in the first-tier tribunal.’<sup>1432</sup> However, since LASPO has taken effect individuals have been unable to access legal aid when once they were and ‘without legal aid, almost all the participants struggled to solve their problems.’<sup>1433</sup> More so, this demonstrates how legal aid for social welfare related claims only becomes available at a later stage once other procedural barriers have been surpassed. McKeever et al. highlight how this means ‘that early intervention for justiciable issues is less likely, which in turn means that it becomes more difficult to avoid the triggers for destitution.’<sup>1434</sup>

The reductions in funding for, and consequently availability of, legal aid has come in the context of austerity. This is something of which the government were warned. Hynes, highlights the Citizens Advice CEO as having stated that ‘the timing of the legal aid cuts due to be implemented in April 2013 could not be worse as they “will hit just as the biggest shake-up in the benefits system in more than 60 years gets underway.”’<sup>1435</sup> In relation specifically to social security entitlements this has therefore resulted in an ‘unlucky coincidence’ by which significant reductions in advice provision have coincided with ‘an increase in advice demand arising from social security reforms.’<sup>1436</sup> This is a manifestation of the ‘double-bind’ of austerity which was addressed in further detail above<sup>1437</sup> and has ‘exacerbated the impact of

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<sup>1431</sup> Sue Harper, ‘The Effects of LASPO on Civil Legal Aid in Wales’ (*Public Law Research Briefing*, 2018) 2 <[https://publiclawproject.org.uk/wp-content/uploads/2018/07/LASPOA\\_briefing\\_Wales.pdf](https://publiclawproject.org.uk/wp-content/uploads/2018/07/LASPOA_briefing_Wales.pdf)> accessed 3 December 2019.

<sup>1432</sup> Organ and Sigafos (n 1417) 12.

<sup>1433</sup> *ibid* 7.

<sup>1434</sup> McKeever et al. (n 1) 8.

<sup>1435</sup> Hynes (n 1430) 99.

<sup>1436</sup> McKeever et al. (n 1) 75.

<sup>1437</sup> See chapter 5.5. (n 983-989)



recent welfare reforms’<sup>1438</sup> as there is almost no specialist advice left to provide support to appeal benefits decisions.’<sup>1439</sup> As such, given the restrictive nature of the changes to legal aid, demand for legal services has increased<sup>1440</sup> whilst the extent of unmet legal need has also increased simultaneously.<sup>1441</sup> The CESCR raises concern that legal aid reforms ‘have restricted access to justice in areas such as employment, housing, education and social welfare benefits’<sup>1442</sup> This lack of access to legal aid in turn, as recognised by the UN Special Rapporteur on Extreme Poverty and Human Rights, ‘exacerbates extreme poverty, since justiciable problems that could have been resolved with legal representation go unaddressed.’<sup>1443</sup> This demonstrates how restrictive changes to legal aid can contribute to increasing destitution. Consequently, it is little wonder that the Bach Commission has recommended that ‘the government restores legal aid for early legal help to pre-LASPO levels for all social welfare law’ which includes, *inter alia*, welfare benefits.<sup>1444</sup>

## 7.5. Concluding Remarks

This chapter has offered a number of solutions aimed at addressing destitution in the UK. I have suggested that the UK’s current social security systems can be altered significantly in order to ensure that welfare benefits act as a safety net against destitution. Currently this is not the case and, in fact, many of those experiencing destitution do so due to failures in social security provision. I have also suggested practical solutions to specific issues, which I have

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<sup>1438</sup> Organ and Sigafos (n 1417) 7.

<sup>1439</sup> *ibid.*

<sup>1440</sup> Bach Commission (n 1405) 29–30.

<sup>1441</sup> Asher Flynn et al., ‘Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial’ (2016) 40 *Melb U L Rev* 207, 208.

<sup>1442</sup> CESCR, ‘Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ (2016) E/C.12/GBR/CO/6’ (n 613) para 20.

<sup>1443</sup> Alston, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the United Kingdom of Great Britain and Northern Ireland’ (n 5) para 38.

<sup>1444</sup> Bach Commission (n 1405) 28.

raised as constituting a part of the destitution experience in the UK.

Beyond this, however, I have suggested more structural changes, which can be implemented to prevent destitution from occurring in the first place. These four recommendations are linked. The first recommendation is to commence the socio-economic duty in the Equality Act and, linking to this, the second recommendation is to make human rights impacts assessments a feature of governmental budget and policy planning. This second recommendation would be a natural consequence of the first as the socio-economic duty is the duty to engage in such assessments. The third recommendation in section 7.4.3. is to make ESCRs explicitly justiciable as ESCRs in the UK and this also links to the first two recommendations as without the ability to enforce the socio-economic duty or requirement to undertake HRIAs these recommendations may be rendered moot. Even so, justiciability alone may not be enough given the UK's constitutional arrangements and as such a reshaping of these arrangements may be required in the form of adopting a written constitution which addresses ESCRs. All three of these recommendations reshape the legal duties and obligations of the state and in turn individuals must be empowered to hold the state accountable to these standards. That is why I have also recommended that access to justice provision be bolstered. This thesis relates specifically to destitution and, as such, for my purposes this recommendation is made only in relation to legal aid for social welfare benefits. This is especially so given that this recommendation will contribute to the other recommendations being met. For example, ensuring individuals can access their full social security entitlement.

In summary, the recommendations in this chapter overlap in a multitude of ways and, for the purposes of addressing and eliminating destitution, are strongly interlinked. I believe that there is no one-stop solution to addressing destitution. However, by expressly framing destitution as a denial of ESCRs and bolstering the realisation of these rights using the recommendations outlined in this chapter, I contend that destitution can be massively reduced

in the short term and in the long term eradicated in the UK. Thus, the UK must better comply with its obligations under the ICESCR in order to address destitution. This warrants the serious consideration of human rights-based solutions as a policy response to destitution.

## Chapter 8: Conclusion

The aim, in writing this, thesis has been to address destitution in the United Kingdom through a human rights framework. Given the poorly defined nature of destitution, this has been no small endeavour. Consequently, in order to act as a basis for the analysis in this thesis, I firstly had to determine a human rights-based definition of destitution. This determination constituted part one and explicitly addressed my first research question: What is destitution and how should it be defined? How does destitution relate to wider poverty? What is the value-added of using a human rights lens?

In chapter 2, I demonstrated that destitution should be defined as a form of severe poverty. Destitution can be distinguished from poverty not simply by a notion of extremity but, also, through the application of destitution themes. Extrapolated from, and highlighted as being central to, existing definitions of destitution I have identified three destitution themes: survival needs, vulnerability, and indignity. Explicitly categorising destitution as an extreme form of poverty not only answers one aspect of my first research question, but additionally allows human rights-based analyses of poverty to analogously inform my human rights-based exploration of destitution. In turn, this addresses another aspect of my first research question: the benefits of the wide engagement of poverty from a human rights-based perspective are indicative of the value added of viewing destitution through this same human rights lens. The value added of using a human rights lens is that by framing needs claims as entitlement claims, a human rights-based approach empowers individuals. This concept of empowerment is also participatory.

Turning to the dominant element of the first research question, how destitution should be defined, destitution so understood constituted the basis from which I translated the destitution experience into the language of human rights. This translation allowed the

destitution threshold and the component rights to be identified. The component rights are the right to an adequate standard of living, the right to housing, the right to water, the right to sanitation, the right to food, the right to clothing, and the right to social security. I have argued that an individual is destitute, from a human rights-based perspective, when their *component rights* are not realised to the level of the *destitution threshold*. This theoretical and logical human rights-based understanding of destitution was expounded upon throughout the remainder of part one in which I utilised the destitution themes to clarify, firstly, the destitution threshold and, secondly, the component rights.

In chapter 3, I recognised that, in order for my human rights-based definition of destitution to be universally relevant and applicable, I had to resolve a tension between universality and context-specificity. My destitution threshold must be universal in that there is a minimum level of realisation below which an individual anywhere in the world is destitute. However, my destitution threshold must also account for the fact that the experience of destitution will vary between states. For example, a level of realisation above this universal minimum level may not guarantee freedom from destitution in contexts such as the UK. Through applying the destitution themes, I have enunciated a two-part destitution threshold and, thus, resolved this tension. This two-part composite understanding of the destitution threshold is composed of a universal base line and a supplementary, context-sensitive standard.

As such, under my definition, no matter where they reside in the world an individual will always be regarded as destitute if they are not able to meet realise one (or more) of their component rights. To be explicitly clear, this encapsulates the destitution theme of survival needs. More so, an individual will be regarded as destitute even if they are able to realise the physical content of their component rights but can only do so on account of a reliance of charitable assistance. Whilst still an aspect of the universally applicable minimum conception of the destitution threshold, this captures the minimum that is required to ensure dignity and

freedom from vulnerability, thus engaging the latter two destitution themes. Given that the express purpose of this thesis is to address destitution from a human rights-based perspective, the categorisation of those who rely upon on charitable assistance to realise their component rights as destitute is further justified through my analysis of the relationship between charity and the realisation of human rights. Therefore, whilst at a minimum the destitution themes of dignity and vulnerability require that the minimum core content of the component rights are realised without reliance on charitable assistance, the destitution themes of indignity and vulnerability can be used to supplement this universal destitution threshold baseline on a context-by-context basis. These twin themes are therefore central to the supplementary context-sensitive element of the destitution threshold. I have highlighted the reasonableness approach and the use of benchmarks and indicators as mechanisms which demonstrate how contextually relevant minimum standards of obligation may be realised. This analysis informed my understanding of the second element of my destitution threshold: the supplementary standard.

In chapter 4, I applied the destitution threshold to the component rights in order to, firstly, establish the universal minimum destitution threshold of each component right and, secondly, establish factors to be considered in the determination of the context-sensitive supplementary element of the destitution threshold.

In sum, part one of this thesis (comprised of chapters 2, 3, and 4) has enunciated a human rights-based definition of destitution. An individual is destitute under this definition if their component rights are not realised to the level of the destitution threshold. This universally requires the minimum core content of the component rights to be realised without reliance on charitable assistance. However, in many contexts – including the UK – an individual would still be destitute even if this universal destitution threshold baseline is met. This is due to the supplementary context-sensitive element of the destitution threshold.

In part two of this thesis, I applied this definition of destitution to the context of the

United Kingdom. Beyond serving as an example of how to apply the definition and how the supplementary context-sensitive destitution threshold may be determined, part two of this thesis addressed the majority of my research questions.

Although touched upon in other parts of the thesis it is predominantly in chapter 5 where, I addressed my second research question: the relationship between social security policy and provision and the occurrence, prevention and alleviation of destitution. Through focusing on the context of rising destitution in the UK over the last decade (austerity), I established that government social security policies, in the context of wider austerity, have been inherently destitution inducing. This is indicative of the intersection between the occurrence of destitution and failures in respect of social security. More so in chapter 7, I have demonstrated, irrefutably, that social security provision has the potential to alleviate destitution in the short term and – combined with other measures – is central to the long-term prevention of destitution.

With respect of research question 2, these findings clearly indicate that destitution represents a failure to adequately realise the right to social security. Beyond this, destitution evidences a multitude of failures with respect to the realisation of ESCRs. More generally, a failure to realise a component right to the universal destitution threshold represents a failure to dispense of the minimum core obligation of that right. In failing to satisfy the obligations incumbent under the minimum core content, destitution constitutes an explicit failure to realise the most basic levels of realisation required by the ICESCR. As I make clear in chapter 6, in the UK destitution more widely constitutes a failure to realise ESCRs. Destitution undermines the availability, affordability, accessibility, acceptability, and quality of the physical content of the component rights. In summary, by utilising a human rights-based definition of destitution I have demonstrated that inherent to destitution there is a failure to realise ESCRs.

My fourth, and final, research question focused upon what can be done to address destitution in the UK more widely and was addressed in chapter 7 of this thesis. Not only have

I addressed the advantages inherent to the utilisation of human rights-based approaches but, also, I have argued that a number of mechanisms can be brought to bear against destitution. Using the metaphor of destitution as a disease, I highlight that there must be a two-pronged approach to addressing destitution: short term reactionary treatment (to address existing destitution) combined with the longer-term immunisation of UK society against destitution (to prevent destitution occurring in the future).

Given the intimacy of the relationship between social security and destitution, the immediate relief for destitution in the UK is a dramatic altering of social security provision. The increased role taken by the state in response to COVID-19 has demonstrated that such an alteration is within its power. The re-conceptualisation of social security provision over the past decade must be undone. With regard to social security, the rationale behind its provision in the UK requires shifting. Social security provision must be guided by the aim of social protection as opposed to fairness to the taxpayer. Social security levels should be informed by a realistic minimum income standard. The minimum wage must also be raised to match this minimum income standard. Additionally, punitive policies such as sanctions must be immediately ended. By ensuring that social security provision aligns fully with ICESCR standards, social security will allow an adequate standard of living and will act as a safety net against the occurrence of destitution in the vast majority of instances.

As well as this, the unaffordability of housing must be swiftly addressed. The UK must work to reduce the costs of housing so that income after housing has been paid for is sufficient to realise the other component rights through the market. Building more social housing will increase supply and in turn lower market rents. Less libertarian measures such as rent controls and increased regulation of landlords must also be considered.

Charitable assistance to provide the content of the component rights must be ended. So long as such provision is required destitution will never be eradicated. Although the long-term



aim must be to eradicate the need for such provision through a combination of my other recommendations, as an interim measure these charitable assistance providers should be ‘nationalised.’ As addressed in chapter 7.3.2, by taking responsibility for the funding and managing of these providers, this would recast the relationship between the individual and the provision of charitable assistance to one between the individual and state provision of aid. This recasting represents an expansion of what is understood by the phrase social security and will result in the individual having rights to aid provision in turn freeing them from the indignity and vulnerability inherent to a reliance on charitable aid.

Beyond these short-term measures, in chapter 7.4. I addressed a range of long-term measures for immunising the UK against destitution. I recognised the need to address inequality and highlighted that the commencement of the socio-economic duty would work towards this aim. If commenced, the socio-economic duty would also engender the use of human rights planning in the budget. Such planning is crucial to ensuring that further government policies do not induce destitution. I have also made two recommendations regarding to justiciability. Firstly, to recognise the justiciability of ESCRs in the UK and, secondly, to enhance capability to enforce claims to existing legal entitlements through improving legal aid provision and access to justice.

Combined, these measures will reduce the likelihood of destitution occurring and, when destitution does occur, enhance the capability of individuals to tackle destitution by empowering rights-based claims against the state. The measures which are needed to address destitution will also achieve more than this: they will contribute to the realisation of numerous ICESCR rights in the UK. The UK is currently failing in its obligations under the ICESCR. Redressing this failure will not only address destitution but may also, in framing destitution from a human rights-based perspective and framing destitution as a failure to realise human rights, act as a catalyst for bolstering the status of ESCRs more generally in the UK.

This thesis offers a highly original and significant contribution. This is not only due to the fact that, as a whole, it for the first time defines destitution from a human rights-based perspective. Other aspects of this thesis are – on their own merit – equally original and significant. My analysis of the ‘forgotten’ right to clothing clarifies the content of this right for the first time and forms the basis for a research paper which is under review and which delineates the content of the right to clothing with respect to Personal Protective Equipment in the context of COVID-19. More so, in framing destitution as being induced by governmental policies, the scholarship in chapter 5 aligns with – and acts as the foundation for - an emerging portfolio of work which seeks to secure accountability for – and tackle - such policies through transformative justice, the sustaining peace agenda, and international criminal law. A key area of future research based upon this thesis relates to the potential of destitution (as a violation of human rights) being challenged judicially outside of the Asylum and Immigration context in the UK. In expressly framing destitution as being caused by government action/policy this thesis may allow a broader understanding of the phrase ‘treatment’ to be argued and as such act as a platform for future research to engage Article 3 of the ECHR. Along this vein and building upon my 2018 publication, future research addressing the relationship between destitution inducing benefit withdrawals and international criminal law is required. Outside of this, my work with Cahill-Ripley places austerity (as understood as structural violence) as a period of non-peace from which we must transition towards peace. This engages the sustaining peace agenda and the field of transitional/transformative justice. These alternative approaches may be all the more crucial in addressing destitution and ensuring basic ESCRs realisation in the austerity which is to surely come following COVID-19 and Britain’s exit from the European Union.

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